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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1900.

BEARDSLEY *v.* WALTON & CO.

1900
Feb. 7.

Adulteration—Food and Drugs—Compounded Drug—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 7.

A sale to the prejudice of the purchaser of a compounded drug, which is not of the nature, substance, and quality of the article demanded, is an offence under s. 6 of the Sale of Food and Drugs Act, 1875, and proceedings for the recovery of a penalty may be taken under that section.

CASE stated by justices for the county of Wilts.

An information had been laid by the appellant, an inspector under the Sale of Food and Drugs Act duly appointed by the county council of Wilts, against the respondents, a limited liability company carrying on the business of bakers, grocers, and general retail shopkeepers at Maiden Bradley, charging them with having unlawfully sold to the appellant, the purchaser, and to his prejudice, a certain drug, to wit, camphorated oil, which was not of the nature, substance, and quality demanded by the purchaser, the said camphorated oil only containing eight parts per cent. by weight of camphor, or less than half the quantity

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of camphor proper to camphorated oil as described in the British Pharmacopœia, which should contain 21 per cent. by weight of camphor.

The proceedings were taken under s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), which enacts as follows: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say—

"(1.) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

"(2.) Where the drug or food is a proprietary medicine, or is the subject of a patent in force, and is supplied in the state required by the specification of the patent.

"(3.) Where the food or drug is compounded as in this Act mentioned.

"(4.) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation."

Sect. 7 enacts that "No person shall sell any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser, under a penalty not exceeding twenty pounds."

After the appellant had given his evidence, the respondents submitted that, as camphorated oil was a compounded drug, proceedings could only be taken under s. 7 of the Act, and that no offence had been or could be committed under s. 6. The appellant contended that it was open to him to proceed under either section, that camphorated oil clearly was a drug as defined by s. 2 of the Act, that s. 7 was primarily intended to apply to physicians' prescriptions, that the penalty was the same under both sections, that all the prosecution had to do was to prove that the sale was to the prejudice of the purchaser,

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and that an offence had been committed under s. 6, under which he had elected to proceed.

The justices were unanimously of opinion that camphorated oil was a compounded drug, that consequently the summons could only be issued under s. 7, and that the respondents' contention was correct in law; they therefore dismissed the information.

The question for the opinion of the Court was whether the justices' interpretation of the law was correct.

F. R. Y. Radcliffe, for the appellant. The proceedings were properly taken under s. 6. All the conditions necessary to bring the sale within that section were present, for it was a sale to the prejudice of the purchaser, and it was a sale of a drug not of the nature, substance, and quality of the article demanded. Sect. 6 in terms contemplates the mixture of drugs and applies to some compounded articles; what it does not apply to are the articles specified in sub-s. 3—that is, foods and drugs "compounded as in this Act mentioned"; it is not every compounded drug, but only drugs so compounded that are excluded from the operation of the section. There is, however, no mention of the manner of compounding in the Act, nor any definition of a "compounded drug," and there is consequently nothing upon which the exception in sub-s. 3 can operate. A sale of a compounded drug, therefore, comes within s. 6 if in other respects the requirements of the section are satisfied. In *White* v. *Bywater* (1), where there had been a sale of tincture of opium deficient in the proper proportion of opium according to the British Pharmacopœia, it was not suggested that the proceedings were not properly instituted under s. 6. [He also cited *Houghton* v. *Taplin*. (2)]

Bruce Williamson, for the respondents. The justices were right in holding that the sale of a compounded drug was only within s. 7, and was not touched by s. 6; the effect of s. 6, sub-s. 3, is to exclude compounded drugs altogether from the operation of that section, and to bring them under s. 7. The two sections deal with distinct offences; for under s. 7 it is not

(1) (1887) 19 Q. B. D. 582. (2) (1897) 13 Times L. R. 386.

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necessary that the sale should be to the prejudice of the purchaser. If the appellant's contention is right, s. 7 is redundant, for every offence under that section would also be an offence under s. 6.

CHANNELL J. I am of opinion that this appeal should be allowed. The justices have expressed their finding in these words: "We were unanimously of opinion that camphorated oil was a compounded drug, and that consequently the summons could only be issued under s. 7"; the use of the word "consequently" gives rise to a difficulty. If they had said that camphorated oil was a drug compounded as in the Act mentioned, the consequence would follow; this, however, they could not find, as there is nothing in the Act as to how drugs are to be compounded. The only way in which this omission can be accounted for is that which was suggested during the argument; that is, that the bill as originally drafted contained a definition of the expression "compounded drugs," which was dropped out of it during its progress through Parliament, while the expression "drug compounded as in this Act mentioned" was left in by an oversight. The result is that sub-s. 3 of s. 6 has practically no operation. The only matter in the Act to which the words "as in this Act mentioned" can refer is s. 7, which does not correspond with the preceding section, but which deals with a compounded drug. I think, therefore, that the meaning to be placed upon this legislation is that nothing is an offence under s. 6, so far as it relates to compounded drugs, unless it is also an offence under s. 7. If that is so, then this case is within s. 6; for whatever meaning may be placed on sub-s. 3, this substance, camphorated oil, cannot come within it; it is therefore within s. 6, not being excluded from its operation by the sub-section.

BUCKNILL J. I agree.

Appeal allowed.

Solicitors for appellant: *Wheatly, Son & Daniel, for Cruttwell, Daniel & Cruttwell, Frome.*

Solicitor for respondents: *J. Trevor-Davies.*

W. J. B.

EVANS *v.* JUSTICES OF CONWAY.

1900
Feb. 8, 9.

Licensing Acts—Licence—Renewal—Appeal to Quarter Sessions—Non-appearance of Licensing Justices—Procedure—Licensing Act, 1872 (35 & 36 *Vict.* c. 94), *s.* 42.

Where, upon an appeal to quarter sessions against the refusal of licensing justices to renew a licence, the licensing justices do not appear, the appellant is not entitled as a matter of right to have his licence renewed, but the Court is at liberty to make inquiry into the circumstances of the case and to dismiss the appeal if the appellant refuses to call evidence or to give the information required by the Court.

CASE stated by the chairman of quarter sessions for the county of Carnarvon.

The appellant had appealed to the quarter sessions against the decision of the licensing justices for the Conway Division at the adjourned general annual licensing meeting refusing to renew the licence of the Royal Oak Inn, Conway, and the court of quarter sessions had confirmed that decision subject to the following case.

The following facts were proved or admitted:—

1. The appellant was the holder of a licence for the sale of intoxicating liquors in respect of a house known as the Royal Oak Inn, Conway.

2. The appellant appeared by counsel in support of the appeal and to apply for the renewal of the licence.

3. No one appeared on behalf of the justices who sat at the adjourned general annual licensing meeting.

4. A solicitor appeared for the Rev. T. Gwynedd Roberts, who had objected to the renewal of the licence at the adjourned general annual licensing meeting.

5. It was contended on behalf of the appellant that the solicitor for the objector had no locus standi, and that as no one appeared on behalf of the justices the appellant was entitled to have his appeal allowed and his licence renewed.

6. The court of quarter sessions overruled these contentions and decided to hear the appeal; thereupon counsel for the appellant, having formally proved that due notice of the appeal

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had been served upon all the justices who sat at the adjourned general annual licensing meeting, and that the appellant together with two sureties had duly entered into the required recognizances, applied for the renewal of the licence; the Court thereupon, without hearing any evidence on behalf of the respondents and in opposition to the renewal of the licence, dismissed the appeal and refused to renew the licence.

The question for the opinion of the High Court was whether the court of quarter sessions were right.

Trevor Lloyd, for the appellant. The appellant was entitled to a renewal of his licence by the court of quarter sessions. The only parties to a licensing appeal at quarter sessions are the applicant and the licensing justices; an objector has no locus standi to appear at quarter sessions: *Boulter* v. *Kent Justices* (1); *Tynemouth Corporation* v. *Attorney-General.* (2) An appeal to quarter sessions is a rehearing, and there must therefore be a hearing de novo between the applicant on the one side and the licensing justices on the other. It lies upon the licensing justices to support their decision upon appeal, using, if they think fit, the evidence produced before them by the objector; for, although the applicant is bound to be prepared to meet the objections of a private objector in the Court below, it is impossible for him at quarter sessions to meet by anticipation the objections in the minds of the licensing justices, who never give their reasons at the licensing meeting for their refusal to renew. Under s. 42 of the Licensing Act, 1872, which applies to an appeal to quarter sessions, *Whiffen* v. *Malling Justices* (3), the licensed person has a primâ facie right to a renewal, and that right is not displaced by the fact that the court of quarter sessions knew that the renewal had been refused by the licensing justices. In such a case as the present the appellant cannot know the case he has to meet unless the respondents begin. [He also cited *Sharp* v. *Wakefield* (4) and *Ruddick* v. *Liverpool Justices.* (5)]

(1) [1897] A. C. 556.
(2) [1899] A. C. 293.
(3) [1892] 1 Q. B. 362.
(4) [1891] A. C. 173.
(5) (1876) 42 J. P. 406.

Ellis J. Griffith, for the respondents. The decision of quarter sessions was right. A licensing appeal is no doubt a rehearing, but the court of quarter sessions is not a court acting judicially in licensing matters: *Reg.* v. *Staffordshire Justices* (1), and there is no burden of proof at all, in the proper sense of that expression; the Court makes what inquiry it likes, and the order in which the evidence shall be called before it is entirely in its discretion; it is a mere matter of procedure. If the appellant's contention is correct, it would be necessary for the licensing justices to appear at quarter sessions in every case where they have refused to renew a licence, otherwise the appellant would get the renewal as a matter of course, and the whole of the proceedings before the licensing justices would thus be rendered useless. [He also cited *Reg.* v. *Thornton* (2); *Reg.* v. *Sharman.* (3)]

Trevor Lloyd, in reply.

CHANNELL J. This case is one of very considerable difficulty, upon which in the general interest it is very desirable that the opinion of another tribunal should be taken. The difficulty arises in this way. Licensing matters and licensing law, although from time to time the subject of various statutory alterations, are nevertheless matters of old standing, the general practice in connection with them dating back to the year 1828, or even earlier. During this time practices had grown up and proceedings had been taken which were founded upon an idea that in *Boulter* v. *Kent Justices* (4) the House of Lords held to be entirely wrong. It had always been supposed that the objectors were parties to the proceedings, and that the proceedings were litigation of the usual character, and as in ordinary cases there were parties to the litigation, so in licensing matters the procedure generally, including such matters as the right to begin, the burden of proof, &c., was the same as that which obtains in courts of justice. But in *Boulter* v. *Kent Justices* (4) the whole of this procedure in licensing matters was practically held to be a mistake, and it

(1) [1898] 2 Q. B. 231.
(2) [1898] 1 Q. B. 334.
(3) [1898] 1 Q. B. 578.
(4) [1897] A. C. 556.

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was said that these proceedings were not proceedings in court at all, but were proceedings before an administrative tribunal, and that there was no lis, no litigation, and no parties. That was a case of the renewal of a licence, so it is not only applications for new licences that are affected. That case had been to quarter sessions, and it raised the question of the powers of quarter sessions on an appeal from licensing justices, the particular decision being that that Court has no power to give costs against the objector. In substance, however, that case is a decision that the proceedings before the quarter sessions are not in the nature of a litigation any more than are those before the licensing justices; both are equally acting as an administrative tribunal. That case raised the question of who were the parties to licensing proceedings; the next important case in the House of Lords, *Tynemouth Corporation* v. *Attorney-General* (1), dealt with the costs of the objector. The main question raised was as to the power of quarter sessions to order the objector's costs to be paid out of the municipal fund, and it became necessary to consider the practice on appeal to quarter sessions from the refusal of the renewal of a licence. In his judgment Lord Davey says that the effect of *Boulter* v. *Kent Justices* (2) is that there was no right in the objector to appeal; he says: "I think that an objector before the licensing meeting has no right to appear and be heard on the appeal to quarter sessions. The only proper respondents to the appeal are the justices themselves, who are served and may appear in the interests of the public to support their own decision." It is clearly in accordance with that view that the licensing justices are not bound to appear to support their decision; they may take up the position that their decision speaks for itself, and that they prefer to appear entirely independent upon the hearing of the appeal, which would be a perfectly proper position to take up, though, as in this case, it may give rise to a question of some difficulty. Then Lord Davey continues: "Provision is made in the Licensing Act for their costs, but not for those of any other person appearing to oppose the appeal. If an objector appears on the appeal he does so voluntarily, and

(1) [1899] A. C. 293. (2) [1897] A. C. 556.

his counsel can only be heard by permission of the bench as amicus curiæ, and he can neither receive nor be ordered to pay costs. He is not, in short, a 'party' to the proceedings." That being so, what is the position when an objector, who is not entitled to be heard, asks the court of quarter sessions to be heard by his solicitor, and it is pointed out that this cannot be done? What is this administrative tribunal to do? The appellant is asking for a renewal of his licence; the licensing justices do not appear, and the appellant is, I think, in the position of a person who has a primâ facie right to a renewal. How is that primâ facie right to be dealt with? Are the quarter sessions entitled to take notice of the fact that the licensing justices have not thought fit to renew the licence, and generally to inquire into the facts of the case? I think they are so entitled. There is some analogy to the case of a man who is committed for trial, and against whom the witnesses for the prosecution do not appear; the man is not entitled to be acquitted at once, but some inquiry is made by the Court, and only when it is reasonably clear that the prosecution has been abandoned is an acquittal directed. I cannot see why in the present case the court of quarter sessions should be debarred from inquiring into the facts, although the appellant may have had a primâ facie right to the renewal for which he was asking; if he had shewn the Court that it had been refused on an improper ground, his renewal might have been granted. I cannot see that the court of quarter sessions was the less entitled to take the course they did because, if the licensing justices had appeared upon the appeal, they would have directed them to begin; the mere fact that the licensing justices would have begun, had they appeared, does not preclude the court of quarter sessions from all inquiry into the circumstances of the case. That being so, I assume that that is what took place: that, as no one was present to object regularly to the renewal, the Court practically inquired of the appellant what he had to say, and that upon his declining to say anything they dismissed the appeal. I have considerable doubt about the case, but a contrary decision would, I think, be ridiculous. It would be absurd to hold that, because the man who succeeded before the

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licensing justices was not allowed to appear at quarter sessions, and the licensing justices abstained (as they properly might) from appearing, there was no other course open to quarter sessions but to grant the renewal without making any inquiry. It is desirable to find some way to avoid so absurd a conclusion, and I think that, though the appellant had a primâ facie right to the renewal of his licence, the fact of its refusal by the licensing justices was sufficient to entitle the quarter sessions to say that the primâ facie right was displaced if the appellant refused to give them the information they required.

BUCKNILL J. I feel no doubt as to the facts of this case, though I have some doubt as to what our judgment upon them should be. There is no doubt that when on September 28 the licensing justices considered the question of the renewal of this licence, the licensee had a right to the renewal unless that right was displaced upon good grounds; and after hearing evidence the licensing justices came to the conclusion that that right had been displaced, and that the case was not a proper one for a renewal; one reason that influenced them was no doubt that the objector appeared and gave evidence. The next step was taken by the appellant, and notices of appeal were served on the justices and the objector, in the latter case quite uselessly, for the objector is not a respondent to the appeal. What happened when the appeal came on to be heard at quarter sessions? An advocate said that he appeared on behalf of the objector; whereupon the appellant's counsel took the preliminary objection that he had no locus standi—an objection which was overruled. This decision meant that in the opinion of the Court the objector had a locus standi; but they did not proceed to call in the objector to advise them, as one would suppose they would naturally have done, and the objector as a fact gave no evidence. The Court, having given this decision, called upon the appellant's counsel to proceed with the appeal, which he did, confining himself however to the proving of his notices. Seeing that the appellant was desirous of reversing the decision of the licensing justices and of securing the renewal of his licence, he seems to have taken a strange course in objecting to

the Court listening to the evidence of persons who had given evidence before the licensing justices and refusing to give any evidence himself. I think that he was not entitled to take that course. The Court was desirous of getting at the facts and eliciting the truth; were they right in saying that no case had been made out for the renewal which had been refused by the licensing justices? I agree with the view of my brother Channell that the difficulty has been created by the decision in *Boulter* v. *Kent Justices* (1), and I think that some of the consequences of that decision can hardly have been foreseen at the time. When we consider that the court of quarter sessions had a right to have information supplied to it, that the appellant refused to give it, and that the objector was not called, I cannot say that they were wrong in refusing to upset the decision of the licensing justices. I hope, however, that this case may be taken to a higher court.

Judgment for respondents.

Solicitors for appellant: *Belfrage & Co., for Chamberlain & Johnson, Llandudno.*

Solicitors for respondents: *Edwards & Cohen, for D. Owen & Griffith, Bangor.*

(1) [1897] A. C. 556.

W. J. B.

1900
Feb. 13.

[IN THE COMMERCIAL COURT.]

TYNE AND BLYTH SHIPPING COMPANY, LIMITED *v.* LEECH, HARRISON & FORWOOD.

Ship—Charterparty—Demurrage—Delay at Loading Port—Continuance of Demurrage Obligation.

Where demurrage commences to be payable under a charterparty owing to the default of the charterers in failing to provide a quay berth at the port of loading, the obligation to pay demurrage continues, in the absence of any default of the shipowner, until the completion of the loading.

A ship was chartered to go to a foreign port for a cargo, the charterers guaranteeing a cargo and quay berth ready at the port of shipment; owing to their inability to provide a quay berth the ship went on demurrage and, while lying at anchor waiting for a quay berth, was run into by another vessel. The ship was properly taken by her captain to another port for repair, and during her absence for that purpose a quay berth fell vacant which would otherwise have been given to her. After her return to the port of loading she was kept waiting a further six weeks for a quay berth. The shipowners claimed demurrage for the six weeks, but not for the period during which she was absent for repairs:—

Held, that upon the return of the ship to the port of loading the demurrage period was resumed without any break in the continuity of the demurrage obligation, and that the charterers were liable to pay demurrage from that date until the loading was completed.

Action for demurrage. The case was argued upon the following agreed statement of facts.

1. The plaintiffs are the owners of the steamship *City of Newcastle*, and their claim is for 994*l.* 17*s.* 6*d.* as demurrage in respect of the said steamship.

2. By a charterparty dated January 12, 1899, made between Messrs. R. Bell & Co., managing owners of the *City of Newcastle*, and Forwood Brothers & Co., charterers and representatives in London of the defendants, it was agreed that the *City of Newcastle* should proceed to Poti and there load a cargo of ore for Baltimore or Philadelphia.

3. The following provisions of the charterparty are referred to as material to the case:—

Clause 4: "The act of God the Queen's enemies restraints

of rulers and princes war insurrections epidemics fire strikes frosts or snow earthquakes floods stoppages of trains miners and workmen accidents to railways and to mines or piers from which the ore is to be shipped bad weather quarantine and all and every other dangers and accidents of the seas rivers and navigation of whatsoever nature or kind and all unavoidable accidents or incidents and all causes beyond the control of the shippers consignees or the charterers which might prevent or delay the delivery of the ore at port of shipment $\frac{\text{and}}{\text{or}}$ the loading or discharging during the said voyage are always mutually excepted."

Clause 5: "The act of God perils of the sea fire barratry of the masters and crew enemies pirates and thieves arrests and restraints of princes rulers and people collisions stranding and other accidents of navigation excepted even when occasioned by negligence default or error in judgment of the pilot master mariners or other servants of the shipowners."

Clause 9: "The cargo is to be loaded in ten running days Sundays and holidays excepted and discharged at the average rate of 400 tons per weather working day Sundays and holidays excepted and all hours on demurrage over and above the said days are to be paid for at the rate of fifteen shillings per hour charterers having the option of averaging time for loading and discharging."

Clause 12: "Subject always to the exceptions enumerated in clause 4 charterers guarantee cargo and quay berth ready at Poti counting from the time steamer has received free pratique and written notice has been given to charterers' agent to that effect or lay days to count in accordance with clause 9."

4. By noon on Saturday, February 11, 1899, the *City of Newcastle* had arrived at Poti and had received free pratique, and written notice to that effect had been given to one Francis Soleliac, the charterers' agent. Owing solely to the number of steamers waiting to be loaded, and not to any exception enumerated in clause 4, a quay berth was not ready for the *City of Newcastle*. Under these circumstances the lay days began to count at noon, February 11, 1899, and ten running days, after excepting one holiday and one Sunday, expired on

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TYNE AND BLYTH SHIPPING COMPANY v. LEECH, HARRISON & FORWOOD.

Friday, February 24. At this date a quay berth had not been provided for the *City of Newcastle*.

5. At 1 A.M. on March 4, while the *City of Newcastle* was lying at anchor in Poti Roads still waiting for a quay berth, the steamer *Tockwith* came into collision with her, doing her serious damage. In consequence of this collision and damage the *City of Newcastle* was obliged on March 7 to proceed to Constantinople to repair. This was a proper and necessary step in the circumstances, and it is not intended to allege in this action that the plaintiffs or their servants were in default, either in respect of the collision, or in respect of the measures taken for the repair of the damage. If it had not been for the collision, the *City of Newcastle* would have got a quay berth by March 8, and would have completed her loading by March 16. By 5.30 A.M. on April 19 the *City of Newcastle* had again arrived at Poti and was ready to receive cargo. But, again owing to the number of steamers waiting to be loaded, a quay berth was not ready for the *City of Newcastle* until June 2, at 8 A.M. By clearing for a foreign port, namely, Constantinople, she lost her turn for a quay berth, and on her arrival back at Poti found a number of fresh steamers had in the meantime arrived, which made her position with regard to getting a quay berth much worse. The loading was completed, and the *City of Newcastle* sailed from Poti at 10 A.M. on June 10, laden with a cargo of about 2578 tons of manganese ore.

6. On July 14 the *City of Newcastle* arrived at Philadelphia, and discharged her cargo in two days. The time allowed for discharge under the charterparty for her cargo of 2578 tons at 400 tons per day was 6 days, 11 hours, and therefore a saving of 4 days, 11 hours was effected.

7. On June 14, by which date differences had arisen between various parties to the adventure, the present defendants undertook by letter of that date, in consideration of the plaintiffs signing a certain bill of lading for the cargo then on board the *City of Newcastle*, to be responsible to the plaintiffs for the demurrage, if any proved to be legally due to them under the charterparty, whether in loading or discharging, and to waive all terms of cesser of liability clause.

8. Upon the plaintiffs' contention the *City of Newcastle* was on demurrage from noon of February 24 until 1 A.M. of March 4, a period of 7 days, 13 hours, and from 5.30 A.M. of April 19 until 10 A.M. of June 10, a period of 52 days, 4½ hours. The plaintiffs do not claim any demurrage for the period from March 4 until April 19, during which the *City of Newcastle* was incapacitated from loading by reason of the collision. The plaintiffs bring into account the 4 days, 11 hours saved in the discharge. In respect of the balance of 54 days, 18½ hours, or 1314½ hours, the plaintiffs make their present claim. The plaintiffs claim that they should have had a ready quay berth without reference to any turn.

9. Upon the defendants' contention, inasmuch as the *City of Newcastle*, but for the collision, would have got a quay berth on March 8, the charterers are not responsible for demurrage for more than what they would have been liable for if the *City of Newcastle* had got her quay berth on March 8 and finished loading by March 16, and on the assumption that they would also have saved the 4 days, 11 hours in the discharge.

11. The Court is to be at liberty to draw all necessary inferences of fact.

Carver, Q.C. (*Adair Roche* with him), for the plaintiffs. The plaintiffs are entitled to the demurrage claimed. Under the charterparty, subject to the exceptions in clause 4, none of which are applicable, the whole burden of providing a berth for the steamer is upon the charterers. The cause of delay was the steamer being run into by another vessel while waiting for a berth, and that is the charterers' risk. In *Jones* v. *Adamson* (1) the ship was not ready, owing to the charterer's default, to load when her turn came, and was detained eleven days for her next turn; when that came the ship was ready, but was not allowed by the harbour-master to go up to load in consequence of the heavy wind that was blowing; and it was held that the charterer was liable to pay damages for detention for the three days as well as the eleven. The present is a stronger case, for there is here what was wanting there—a contract to

(1) (1875) 1 Ex. D. 60.

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pay demurrage. The delay was one delay, not two separate delays, the obligation to pay demurrage being merely suspended during the absence of the vessel at Constantinople for repair.

Joseph Walton, Q.C., and *Horridge*, for the defendants. The defendants are not liable to pay demurrage in respect of the period after the vessel came back from Constantinople after being repaired. If the claim were for damages, it might perhaps be successfully contended that the exceptions in clause 4 of the charterparty would not apply, and that the defendants were liable for all damages following from the breach of their undertaking to find a loading berth. But the claim is for demurrage under the contract, and the contract is subject to the exceptions contained in clause 4, one of which is an exception of all causes beyond the control of the charterers which may prevent the loading of the cargo. The loss of a quay berth arose from the collision, which was a cause over which the defendants had no control, and is within the exceptions. The loss of time was the result of the steamer's going to Constantinople, which was the result of her own necessity, and not of anything for which the charterers can be held responsible.

Carver, Q.C., in reply. The exceptions in clause 4 are germane to the obligation to load in ten days, but are not germane to the payment of demurrage, which is a simple and unqualified obligation to pay money at an agreed rate per hour. In any event, clause 4 cannot be read so as to include among the exceptions prevention of loading owing to inability to get a quay berth; if that were excepted, the guarantee of a quay berth by the charterers in clause 12 would be useless.

KENNEDY J. I am of opinion that the plaintiffs are entitled to recover in this action. The matter is not wholly free from difficulty, but upon the whole I have come to the conclusion that, when once the shipowners were in a position to say, "Our vessel is on demurrage, and you are bound under the charterparty to pay us 15*s.* an hour," from that time, unless some default could be attributed to the shipowners, the demurrage obligation was enforceable against the charterers. What happened here was that, after the ship had come on demurrage

under the charterparty and the demurrage obligation had commenced to operate, she was run into while in the roads by another vessel, whereupon the master took the proper and necessary step of taking her to Constantinople for the purpose of repair. For the period while the vessel was absent at Constantinople instead of being at Poti no claim for demurrage has been made by the plaintiffs; but, although she was for some time at Constantinople, she was not there by reason of any violation of the charterparty engagement for which the owners would be responsible, but for a good reason which excuses her or her owners from any blame as between herself and those who were to load her. On her return to Poti the vessel again went on demurrage, and the demurrage period was resumed. I think that, although no claim has been made on either side in respect of the period during which the vessel was away at Constantinople, the period of demurrage was resumed, without any break in the continuity of the obligation, when she got back to Poti, and that it lasted for the time claimed for in this action. The present case does not, in my judgment, fall within any of the exceptions recognised by the authorities with regard to the demurrage obligation, and the fact that another cause prevented the vessel from getting her berth no more affects the question than if the ship had been driven to sea by a gale of wind, in which case the loss of time could not be attributed to the owner's default. I think, therefore, that after the demurrage obligation had once commenced, it was not broken by any event for which the owners were responsible.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Maples, Teesdale & Co., for Bramwell & Bell, Newcastle-on-Tyne.*

Solicitors for defendants: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

W. J. B.

1900
March 6, 14.

[IN THE COMMERCIAL COURT.]

BECKHUSON & GIBBS *v.* HAMBLET.

Principal and Agent—Stock Exchange—Broker lumping several Orders in one Contract—Liability of Principal to Jobber on Default of Broker.

The defendant employed a firm of brokers on the Stock Exchange to purchase for him shares in a certain undertaking, and instructed them to "carry over" 210 of these shares to the next account. The brokers, having orders from other clients for shares in the same undertaking, purchased by a single contract in their own name 360 of these shares for the next account from the plaintiffs, who were jobbers on the Stock Exchange, and they apportioned in their books 210 of these shares to the defendant. Before the next settling day the brokers were declared defaulters on the Stock Exchange, and, in accordance with the rules of that body, their transaction with the plaintiffs was closed by the official assignee, the price of the shares being fixed at the price then current. The plaintiffs, having ascertained that the brokers were acting for the defendant as regarded the 210 shares, tendered those shares to him, and, on his refusal to take them, sold them on the settling day and claimed from the defendant the difference between the contract price and the selling price:—

Held that, since the brokers had lumped the defendant's order with the orders of other clients, and had contracted in a single transaction with the plaintiffs for the purchase of a larger number of shares than they were authorized to purchase for the defendant, no such contractual relation existed between the plaintiffs and the defendant as would support the action.

Effect of rule 177 of the Stock Exchange rules discussed.

ACTION tried before Kennedy J. in the Commercial Court.

The facts and arguments sufficiently appear from the judgment.

Isaacs, Q.C., and *G. A. H. Branson*, for the plaintiffs.

H. Reed, Q.C., and *E. Morten*, for the defendant.

Cur. adv. vult.

March 14. KENNEDY J. read the following judgment:—The plaintiffs in this case are a firm of jobbers on the London Stock Exchange. They claim from the defendant 186*l.* 7*s.* 6*d.* as

damages for an alleged breach of contract in not taking delivery of 210 Louisville shares and paying the plaintiffs for the same on December 29, 1899. The history of the case, so far as it is material to my decision, appears to be this. The defendant, who is not a member of the Stock Exchange but carries on business as an "outside broker," had for some time before December 12, 1899, been employing Messrs. E. Preston & Co., who were members of the Stock Exchange, as his brokers in dealings upon the Stock Exchange in Louisville shares. Messrs. E. Preston & Co. had 210 of these open for him on December 12, and had instructions to "carry over" for him to the end of December account. What they did was this: They bought from the plaintiffs for the end of December account 360 Louisvilles; of these they apportioned, or intended to appropriate, and so far as book entries are concerned they recorded in the usual way in their books their apportioning or their intention to appropriate, to the fulfilment of the defendant's instructions, 210 out of the 360 shares, to the delivery of which, under their contract with the plaintiffs, they would become entitled on December 29, which was settling day. This "carrying over," so far as relates to 210 shares, was notified to the defendant in the usual manner. No writing passed between E. Preston & Co. and the plaintiffs. The plaintiffs knew no one in the making of the contract but E. Preston & Co. The defendant was not informed of the name of the firm with whom E. Preston & Co. were carrying over for him. The balance of the 360 Louisvilles beyond the defendant's 210 was carried over with the plaintiffs by E. Preston & Co. in fulfilment of the orders of a Mr. Bristowe. A further number of Louisvilles for the same account was carried over with another jobber of the name of Spyer, but these E. Preston & Co. intended to appropriate to the fulfilment of the instructions of a third client, a Mr. Gingold. On December 15, in consequence of the failure of certain clients (other than the defendant) to fulfil their obligations, E. Preston & Co. failed, and were declared defaulters on the Stock Exchange. Thereupon, in accordance with rule 177 of the Stock Exchange rules and regulations, and for the purpose of

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closing the transaction between the plaintiffs and E. Preston & Co., Mr. Richardson, the official assignee appointed by the committee of the Stock Exchange, fixed the price of the 360 Louisville shares at the price current in the market immediately before the declaration of the failure of E. Preston & Co. In the plaintiffs' ledger book the transaction in respect of the 360 Louisvilles is entered as closed between them and E. Preston & Co. by a buying back at the closing or, as it is called, the "hammer" price, and a difference of 93*l.* 2*s.* 6*d.* appears in favour of the plaintiffs. On December 16 and 18 Mr. Leslie Gibbs, a member of the plaintiff firm, called at the office of E. Preston & Co. and ascertained, in respect of 210 out of the 360 Louisvilles for which they were under contract to E. Preston & Co., that they had been bought on the instructions of the defendant. Mr. Gibbs proceeded to see him. The defendant told Mr. Gibbs that his account with E. Preston & Co. was closed when that firm failed, refused to have anything to do with the plaintiffs in the matter, and referred Mr. Gibbs to his solicitors. On December 29 Mr. Gibbs tendered 210 Louisvilles to the defendant and was refused acceptance. Mr. Gibbs immediately sold on the Stock Exchange 210 Louisvilles to the firm of Leon Brothers for cash. It is for the difference—namely, 186*l.* 7*s.* 6*d.*—between the contract price and the selling price on December 29 that the plaintiffs sue the defendant in this action. The plaintiffs assert a right to sue the defendant as the undisclosed principal of E. Preston & Co. upon the contract made by that firm with the plaintiffs on December 12 in respect of 210 out of the 360 Louisville shares which formed the subject of their contract. The defendant denies this right altogether, relying both on principles of law which are of general application and also upon the particular incidents of this transaction as a transaction which is affected by the printed rules and the unwritten usages of the London Stock Exchange. It is convenient therefore that, before I deal with the points raised by the respective parties at the trial, I should state concisely my view of the effect of the Stock Exchange rules and practice, so far as they can be held to be relevant to the issues raised for decision in the present case.

The general scheme of the rules and regulations is plain enough. The Stock Exchange does not recognise in its dealings any other parties than its own members (see rule 53). It forbids the initiation of legal proceedings against the principals of a member or of a defaulter without the consent of such member, of the defaulter's creditors, or of the committee (rule 54). In a Stock Exchange transaction such as that between E. Preston & Co. and the plaintiffs, if all goes regularly, the jobber, as I understand the procedure, throughout deals with the broker. It is only in the case of the failure of the broker, ordinarily, that any application is made by the jobber to the broker's client. In that event the jobber does put himself in communication either indirectly through the broker, or directly, as Mr. Gibbs did here, with the broker's client. But at this point, and before we consider the nature of this application, we have to look at the operation of rule 177, which a broker's failure brings immediately into play. It is to the discussion of the effect, in practice and in law, of this rule that a large portion of the evidence and the argument at the trial of this action was devoted. As will appear in a later part of this judgment, my decision of this case is based upon a point which is independent of this branch of the case; but as it was agreed by counsel to be a matter of some importance and was very fully and carefully argued it is, I think, my duty to deal with it. Rule 177 runs thus: "In every case of failure, the official assignee shall publicly fix the prices current in the market immediately before the declaration, at which prices all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such stocks, shares, or other securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to, or claimed from the official assignees. In the event of a dispute as to the prices named, they shall be fixed by two members of the committee." As to the purpose and the working of this rule, nothing that I have heard in the argument or in the evidence in this case has in any material respect shewn a variance from the very lucid exposition of the meaning and operation of the rule (then numbered 168) which is set forth in

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the report of *Ex parte Grant, In re Plumbly* (1), as part of an affidavit sworn in that case by some of the leading members of the Stock Exchange, or from the evidence of the official assignee given nine years later in *Hartas* v. *Ribbons*. (2) The object of the proceeding under this rule of the Stock Exchange, as I understand it, is what may properly be termed a domestic object. The purpose is to adjust the accounts of the members of the Stock Exchange inter se, dropping the defaulter, by reason of his default, out of the bargains in which he has been one of the contracting parties. The method employed is the creation of a fund in the hands of the official assignee. This fund is formed by the payment to him by members of the Stock Exchange of the difference in value of the stocks or shares in which they have dealt with the defaulter as determined by the prices fixed by the official assignee at the time of the default, when the change in price of any of such stocks or shares is against such members; and out of the fund members are entitled to claim payment for any such differences when in their favour. The defaulter does not by reason of his default acquire any right or claim to differences or damages in respect of differences in his favour between the contract price and the closing price, nor can he make any claim for himself to the moneys which are paid in respect of such differences to the official assignee by the members from whom such differences are due. What is effected is an artificial settlement of the defaulter's dealings with his fellow-members, after which he and they are precluded inter se from claiming from each other the performance, or moneys in respect of the non-performance, of any contracts of purchase or sale which were existent and open at the time of the default. But the settlement is essentially a *domestic* settlement. According to the practice of the Stock Exchange the defaulting broker's client, if he is not himself in default to the broker, has the right either to have the transaction carried through between himself and the jobber with whom the broker has contracted in respect of shares in which he is interested, or to accept the

(1) (1880) 13 Ch. D. 667, at pp. 673, 674.

(2) (1889) 22 Q. B. D. 254, at p. 255.

assignee's closing, or to transfer the account in respect of his shares to another broker for the purpose of carrying out the bargain through him. If the client chooses to accept the closing price, then, according to *Hartas* v. *Ribbons* (1), but not otherwise (*Duncan* v. *Hill* (2)), he is bound to indemnify the defaulting broker in respect of the difference found, upon the official closing under rule 177, to be against him and in favour of the jobber. If the client of the defaulting broker does complete the transaction which the jobber had open with the defaulter at the time of his default, and upon completion the jobber receives any amount in excess of the price fixed by the official assignee at the time of the default for the stock which is the subject of the bargain, the jobber is bound to account for and pay over this excess to the official assignee. It goes into the fund out of which, as I have already stated, the indebtedness of the jobber to the members of the Stock Exchange as ascertained artificially by the official closing is liquidated by the official assignee. Upon the foregoing state of facts in regard to the history of the particular case and in regard to the rules and practice of the Stock Exchange, so far as they appear to me to be relevant, have the plaintiffs a right of action against the defendant? It appears to me that if privity of contract can be made out they have that right. If the contract between the plaintiffs and E. Preston & Co. was one by virtue of which the plaintiffs as the sellers and the defendant as the principal of the buying broker came under an enforceable liability to each other in respect of its performance, I am of opinion that there was a breach of the contract on December 29, whereby the plaintiffs suffered loss, and that, as the plaintiffs notwithstanding the defendant's repudiation on December 16 and 18 were entitled to wait till December 29, the date for the completion of the contract, the sum claimed by them as the damages ascertained on December 29 would represent the amount legally claimable for that loss. I am further of opinion—subject to the same proviso—that there is nothing in the application of the rules or in the practice of the Stock Exchange which would, in case of

(1) 22 Q. B. D. 254, at p. 255. (2) (1873) L. R. 8 Ex. 242.

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a breach of contract, prevent the plaintiffs, after the broker's default, from suing the defendant in respect of it, or, if the refusal to complete had been upon the part of the plaintiffs, would have prevented the defendant from suing the plaintiffs. The defendant's contentions that, whatever might otherwise have been the plaintiffs' rights against the defendant, they ought not to be allowed to have recourse to those rights now, because they must be held to have chosen to give credit exclusively to the defaulting broker, and that, under the operation of rule 177, there had been a conclusive election on their part to have recourse only to the defaulting broker, are contentions which, in my judgment, ought not to prevail. If the contract between E. Preston & Co. and the plaintiffs did, as originally constituted, place the defendant in the position of an undisclosed principal, liable when disclosed to be sued by the plaintiffs upon the contract in case of breach as the broker's unnamed principal, I see no proof of credit being given by the plaintiffs to the apparent principal exclusively in such a way as to bar the right of recourse against the defendant; and, as to the operation of rule 177, it appears to me that the "closing" thereby rendered obligatory upon members of the Stock Exchange (and, therefore, I may point out, affording no evidence of "election" on the part of those who are affected by it) leaves the jobber, both according to the practice of the Stock Exchange and in point of law, liable, in respect of any contract open with the defaulting broker at the time of his declaration, to be called upon by the broker's principal to complete on the due date; and, if this be so, why may he not, pari ratione, claim completion from that principal? It was stated before me in the course of the evidence that in fact the jobber upon the broker's failure often does make such a claim and the claim is acceded to. Be that as it may, it appears to me to be clear in regard to these Stock Exchange proceedings that, to borrow the language of James L.J. in *Ex parte Grant, In re Plumbly* (1), "whatever the liabilities and the rights of the outside world may be, they remain unaffected." But the

(1) 13 Ch. D. 667, at p. 679.

failure of these contentions on behalf of the defendant leaves standing, as it seems to me, that which, according to my view of the case, is a real and fatal obstacle to the plaintiffs' success in this action. It appears to me that no contractual liability of the defendant to the plaintiffs ever existed in respect of this transaction. The defendant's authority to the broker was to "carry over"—in substance and effect to buy for him for the end of December account—210 Louisville shares. What the broker did was to buy in his own name from the plaintiffs for that account 360 Louisville shares. He did that which is, I believe, a common thing, and often no doubt from the business point of view a very convenient thing. He lumped, if I may use the word, the orders of two clients in one contract of purchase in his own name. In so doing he acted, I doubt not, in perfectly good faith, allocating in his books a proper proportion of the total number of shares contracted for to the two clients respectively; but it appears to me that the contract he so made was *his* contract and not a contract of either of his clients. A very similar course had been taken by the broker, the plaintiff in the action, upon the London tallow market, in *Mollett* v. *Robinson*. (1) The defendant there was in a position analogous to that of the defendant here, and Simpson & Co. in a position analogous to that of the plaintiffs here. Blackburn J. in his judgment in the Exchequer Chamber points out the necessary result (2): "The defendant could not call upon Simpson & Co. to deliver him 50 tons of tallow under the contract of the 2nd of April, because Simpson & Co. had not engaged to deliver any smaller quantity than 150 tons. Nor could Simpson & Co., if willing to deliver the smaller quantity of 50 tons, compel the defendant to accept them, because, if they had been unwilling sellers, the defendant could not have forced them to deliver him that smaller quantity . . . . and I cannot think that the difficulty is cured by any equity entitling the now defendant to use the plaintiffs' name and sue upon the contract pro tanto for himself." Brett J., in

(1) (1870) L. R. 5 C. P. 646; (1872) L. R. 7 C. P. 84; (1875) L. R. 7 H. L. 802.

(2) L. R. 7 C. P. at p. 108.

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the opinion delivered by him in the same case when in the House of Lords (1), expressed his concurrence with Blackburn J. in regard to the "supposed equity," and said (2): "It is admitted on all hands that the contracts made with W. W. Simpson & Co. on the 2nd of April, and with Rayner & Co. and Simpson & Co. on the 28th of April,"—the firms mentioned as standing in the same position to the defendant as the present plaintiffs do here—"were not contracts between any of those firms and the defendant. The difference between the quantity of tallow mentioned in them" (the contracts) "and in the orders of the defendant prevents them from being contracts with the defendant." The same point in regard to Stock Exchange transactions has been recently dwelt upon in the judgments of Lord Esher M.R. and Rigby L.J. in the case of *May and Hart* v. *Angeli*. (3) Counsel has furnished me with a copy of the shorthand note of the judgments in the Court of Appeal as it appears in the appendix to the printed case on the appeal to the House of Lords. The judgment of the majority of the Court of Appeal was there reversed, but, as I understand the judgment of the Lord Chancellor (4), not on any ground of difference from the majority of the Court below upon this point, but upon a difference as to the view to be taken of the facts, because the Lord Chancellor held that the transaction was one the real nature of which was absolutely different from the ordinary case of a buying of shares through a broker. There is no usage of business on the Stock Exchange which can, as the plaintiffs' counsel seemed to suggest, avail to help the plaintiffs through this difficulty. There is a usage, no doubt, that the stockbroker contracts in his own name. It by no means follows from this that he should lump the orders of several clients, and buy, not what a particular client has authorized, but a different and larger quantity. But let it be assumed that the usage exists in its most ample form. Let it be assumed that there is a usage on the Stock Exchange, legally valid and known to and binding upon a client such as the

(1) L. R. 7 H. L. 802, at p. 824.
(2) L. R. 7 H. L. at p. 820.
(3) (1897) 13 Times L. R. 568.
(4) (1898) 14 Times L. R. 551.

defendant, that a stockbroker employed in the purchase of shares for a client properly may, if he thinks it convenient, fulfil his duty to his client although, instead of creating, as it is ordinarily a broker's duty to create, a contractual relation between his client and the seller he lumps the client's order with other orders and in his own name contracts in a single transaction with the selling jobber for the purchase of a larger number of shares than the client has instructed him or authorized him to buy. What follows from this assumption? This only, as it appears to me: that, as the broker will have fulfilled his duty according to usage, the client cannot complain, and is bound to pay the broker his commission and indemnify him against such liabilities as the broker may necessarily or properly incur in the course and for the purpose of his employment. Surely the usage in no way assists the plaintiffs' case here. The plaintiffs' case is not a case of a broker suing his client for indemnity in respect of shares bought for the client in a way which is sanctioned by the rules and usages of the Stock Exchange, but it is the case of a seller seeking to have recourse against the principal of a broker who has contracted with the seller in his own name by a contract for the purchase of a larger number of shares than that which the client authorized, and which included a number which were being obtained by the broker for a different client. The usage cannot operate, in my judgment, so as to make a man liable upon a contract which is not, in point of law, *his* contract; it cannot create contractual rights between parties where none exist according to legal principle. Indeed, the very meaning of the usage may, as it seems to me, be stated in language used by Blackburn J. in his judgment in *Mollett* v. *Robinson* (1) in regard to the custom which was under discussion in that case—it is "not to require the broker to take care that privity of contract is established between the broker's client and the person who makes the contract with the broker into which he enters in consequence of his client's order." In my opinion no such contractual relation has existed between the plaintiffs and the

(1) L. R. 7 C. P. at p. 109.

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defendant as is necessary to support this action, and therefore I must give judgment for the defendant.

Judgment for the defendant.

Solicitors for plaintiffs: *Spyer & Sons.*
Solicitors for defendant: *Albert Myers.*

A. P. P. K.

1900
March 12.

[IN THE COMMERCIAL COURT.]

THE HARROWING STEAMSHIP COMPANY, LIMITED *v.* TOOHEY.

Ship — Transfer — Registration — General Lighthouse Fund — Fees — Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 *Vict. c.* 44), *s.* 3, *Sched. I.*

The Merchant Shipping (Mercantile Marine Fund) Act, 1898, Sched. I., gives a scale of the fees which are to be paid on the transfer of British ships "according to the gross tonnage represented by the ships or shares of ships transferred." Fifty-eight shares in a ship, each share being one-sixty-fourth, were transferred to a firm by twenty different bills of sale:—

Held, that the firm was liable to pay a separate fee, according to the scale, on the tonnage represented by the shares comprised in each bill of sale, and not merely to pay one fee upon the total of the tonnage represented by all the shares transferred.

COMMERCIAL CAUSE tried before Kennedy J. without a jury.

The action was for damages for the alleged wrongful refusal of the defendant to register the plaintiffs' name as transferees and owners of certain shares in six ships.

The action came on for trial upon an agreed statement of facts, which was as follows:—

1. The defendant is, or was recently, chief officer of Customs at the port of Whitby within the meaning of s. 4, sub-s. 1 (*a*), of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), and is, or was recently, therefore, registrar of British ships at the said port.

2. On July 4, 1899, the plaintiffs produced to the defendant as such registrar 166 bills of sale for the transfer to the plaintiffs of, in all, 316 shares in six registered ships, with the

declarations of transfer required by s. 26 of the Merchant Shipping Act, 1894 (1), and requested the defendant to enter their name as transferees in the register book as owners of the said shares, and indorse on the said bills of sale the fact of such entry having been made in accordance with the provisions of the last-mentioned section. The bills of sale represented the undermentioned shares in respect of the six vessels:—

Name of Vessel.	Gross Tonnage.	No. of 64th Shares.	No. of Bills of Sale.	Gross Tonnage represented by such Number of 64th Shares.	Fees.
					£ s. d.
Ethelburga .	2223	58	20	2015	4 0 0

[The names of the five other vessels, with particulars under the above headings, then followed. The amount of the fees appearing in the last column as tendered by the plaintiffs in respect of the six vessels was 24*l.* 10*s.*]

There was only one declaration of transfer tendered in the case of each ship, which declaration included all the shares dealt with by the separate transfers relating to shares in such ship. It is not admitted, on the part of the defendant, that separate declarations in respect of each transfer could not, strictly speaking, have been required. The plaintiffs at the same time tendered to the defendant the sum of 24*l.* 10*s.*, as the amount due for fees upon such registration under the provisions of s. 3 of the Merchant Shipping (Mercantile Marine Fund) Act, 1898. (2) The sum of 24*l.* 10*s.* is arrived at by

(1) 57 & 58 Vict. c. 60, s. 26: "(1.) Every bill of sale for the transfer of a registered ship or of a share therein, when duly executed, shall be produced to the registrar of her port of registry, with the declaration of transfer, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share, and shall indorse on the bill of sale the fact of that entry having been made, with the day and hour thereof."

(2) The Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict. c. 44), s. 1, constitutes a General Lighthouse Fund, to be applied to the payment of the expenses charged thereon by the Act.

Sect. 3: "Such fees shall be paid in respect of the registration, transfer (including transmission), and mortgage

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charging one fee on the scale mentioned in the said Act upon the total of the tonnage on each of the said ships represented by the shares transferred in such ships respectively, and dealt with by the transfers relating thereto respectively.

3. The defendant refused to register the plaintiffs' name without the payment of a separate fee upon the said scale on the tonnage transferred by each bill of sale. The amount payable on this principle would be 118*l.* 17*s.* 6*d.*

4. The point for the decision of the Court is whether the fees tendered by the plaintiffs were sufficient. If such fees were sufficient, it is agreed that the plaintiffs are entitled to judgment, and damages for a nominal amount, with costs.

Horridge, for the plaintiffs. The fees specified in Sched. I. of the Merchant Shipping (Mercantile Marine Fund) Act, 1898, are imposed for the purposes of the General Lighthouse Fund, and not in order to provide for the expenses of the registration of each transfer. The intention of the Act is that the transaction should be looked at as a whole, and one fee, according to the scale, should be paid on the gross tonnage of all the shares transferred to the person who seeks to be registered as

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of British ships as the Board of Trade, with the consent of the Treasury, determine, not exceeding those specified in the First Schedule to this Act, and all such fees shall be paid into the Exchequer: Provided that fees shall not be payable under this section in respect of vessels solely employed in fishing or sailing ships of under one hundred tons."

"FIRST SCHEDULE.

"Table of Maximum Fees to be paid, on the Registration, Transfer, and Mortgage of Ships.

"2.—*Transfer and Mortgage.*

"2. On transfer, transmission, registry anew, transfer of registry, mortgage, and transfer of mortgage.

"According to the gross tonnage represented by the ships or shares of ships transferred, &c. (e.g., the transfer of a $\frac{1}{64}$ share in a ship of 6400 tons to be reckoned as the transfer of 100 tons).

	£	*s.*	*d.*
Under 10 tons	0	2	6
10 tons and under 20 tons	0	5	0
20 „ „ 30 „	0	7	6
30 „ „ 40 „	0	10	0
40 „ „ 50 „	0	12	6
50 „ „ 75 „	0	15	0
75 „ „ 100 „	0	17	6
100 „ „ 125 „	1	0	0

And a further fee of 2*s.* 6*d.* for every additional 50 tons, or part of 50 tons, up to 500 tons, after which 2*s.* 6*d.* for every 100 tons, or part of 100 tons."

the owner of those shares. The fee is on the transaction, not on the several documents by which the shares are transferred. It is a fee payable in respect of ownership of a ship or shares in a ship where the ship or shares have been transferred to one person, and it makes no difference that the transfer of the ship or shares to that one person has been effected by transfer from different transferors. The fee is payable, in the words of Sched. I., "according to the gross tonnage represented by the ships or shares of ships transferred." The construction of the Act is at least doubtful, and if any doubt exists the Act, which is a taxing Act, should be construed in favour of the subject: *Stockton Ry. Co.* v. *Barrett* (1), per Lord Brougham; *In re J. Thorley, Thorley* v. *Massam* (2), per Lindley L.J.; Maxwell on Interpretation of Statutes, 3rd ed. pp. 401, 402.

Sir Robert Finlay S.-G. (*S. A. J. Rowlatt* with him), for the defendant. The fee is imposed on transfers of interest. In order to determine what fees are payable, the only question is, how many transfers of interest have there been to the person who seeks to be registered as owner? Taking the case of the *Ethelburga*, twenty separate interests have been transferred to the plaintiffs. If one person having five shares transfers them to five different persons, there are five different transfers of interest, and so there are if five persons having five shares between them transfer those five shares to one person. The argument for the plaintiffs is based on the fallacy that there are any the less five transfers because they result in transferring the five shares to one person instead of to five persons.

Horridge replied.

KENNEDY J. I think this matter is reasonably clear, and the view which the Solicitor-General has contended for is right.

As I read the Act and schedule, on a transfer there is to be a payment of a fee according to the gross tonnage represented by the ships or shares of ships transferred. Now, in the present case one purchaser gets transferred to him a number of shares. Those shares are not merely transferred by different

(1) (1844) 11 Cl. & F. 590, at p. 607. (2) [1891] 2 Ch. 613, at p. 623.

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documents—the charge is not a charge upon documents—but each of those transfers is in fact a separate transaction, and in that sense a separate transfer. Just as, I take it, if a man got by will a transmission of ten shares, and purchased another ten, each ten of those would be chargeable with a separate fee when he came to register, although possibly the transmission and the purchase might be at the same time, so it seems to me that the plaintiffs here, although they may have purchased shares at the same time from different persons, ought to pay according to the scale on the gross tonnage represented by the shares in each transfer as a separate transaction, and as if they had not at the same time bought the others. I am clearly of opinion that the defendant is entitled to my judgment.

Judgment for the defendant.

Solicitors for plaintiffs: *Holman, Birdwood & Co.*

Solicitor for defendant: *C. J. Follett, Solicitor of the Customs.*

W. A.

1900

March 23.

In re FLACK. *Ex parte* BERRY.

Bankruptcy—Arrears of Water Rate—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 43, 53, 70–74—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *s.* 48—"*Incoming Tenant*"—*Trustee in Bankruptcy—Payment of Arrears under Protest—Trustee's Right to Recover same from Water Company.*

A debtor having been adjudicated a bankrupt, his trustee in bankruptcy took possession of his business premises and found that the water rate was in arrear. The trustee offered to pay in advance from the date of the adjudication for a supply of water, but the water company declined to supply it unless the arrears were paid, and cut off the water. Thereupon the trustee paid the arrears under protest:—

Held, that under s. 48 of the Metropolis Water Act, 1871, the trustee, being in the position of an "incoming tenant," was not liable for the arrears, and was entitled to recover from the water company the amount paid under protest.

THIS was an application that raised the question whether the trustee in bankruptcy was liable for arrears of water rate under these circumstances.

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FLACK, *In re.* BERRY, *Ex parte.*

On July 28, 1899, a receiving order was made against one Flack, a trader, and the same day he was adjudicated a bankrupt, and on August 8 Oscar Berry was appointed his trustee in bankruptcy.

At the date of the adjudication the bankrupt was carrying on the business of an oil and colour merchant at several leasehold shops, and the trustee on his appointment took possession of the shops with a view to carrying on the business pending a sale for the benefit of the estate. It then appeared that the water rate in respect of some of the shops was in arrear for the previous quarter ending June 24, and the water company demanded payment of the arrears and threatened to cut off the water. The trustee refused to pay the arrears on the ground that it was not a preferential debt, and offered to pay in advance as from the date of the adjudication for all water supplied to the premises. The water company refused his offer and cut off the water. Thereupon the trustee paid the arrears under protest, and the water company reconnected the water. The trustee now applied that the water company might be ordered to repay him the sum he had paid them, which, including the cost of reconnecting the water, amounted to 4*l.* 14*s.* 3*d.*

Mellor, for the trustee. This is not a case under s. 53 of the Waterworks Clauses Act, 1847, but falls under s. 48 of the Metropolis Water Act, 1871. (1) It is the case of a consumer leaving the premises, because on Flack being adjudicated bankrupt his business premises vested in his trustee in bankruptcy. The trustee, therefore, was in the position of an incoming tenant who was entitled to a supply of water, and there was no agreement to pay the arrears. The company may rely on

(1) The Metropolis Water Act, 1871, enacts:—Sect. 48: "In case any consumer leave the premises where water was supplied to him without paying to the company the rate due from him, the company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears, but the company shall, notwithstanding any such arrears, supply water to the incoming tenant on being required by him so to do."

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FLACK, *In re.* BERRY, *Ex parte.*

In re Smith (1), but it is distinguishable. In that case a receiving order only had been made, and there was no adjudication, and the debtor had not ceased to be the tenant or occupier. Further, a supply of water was absolutely necessary here for carrying on the business. The trustee is, therefore, entitled to recover the money he has paid under compulsion.

Reed, Q.C., and *R. H. Acland*, for the company. The company do not rely on *In re Smith*. (1) This case turns on the proper meaning of s. 53 of the Waterworks Clauses Act, 1847. (2) Under that section the trustee, by virtue of his appointment, became the owner or occupier of the premises, and entitled, on connecting his premises with the company's pipes, to have a supply of water, and if the company refused to supply water his remedy was to proceed against them for penalties under s. 43 of the Act: *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (3) But, then, ss. 70–74 make the water rate payable in advance, and empower the water company, when the rate is in arrear, to cut off the supply. Here the water rate was in arrear, and there was no actual payment or tender in advance by the trustee. The payment of the arrears must be treated as either a voluntary or involuntary act, and cannot now be recovered: *Moses* v. *Macferlan*. (4)

Mellor, in reply.

WRIGHT J. I think the water company have made a mistake. I am not called upon to decide whether the trustee has complied with s. 53 of the Waterworks Clauses Act, 1847, by tendering or paying a quarter's water rate in advance; but if it were necessary, I think I should have been prepared to hold that what he did under the circumstances amounted to a

(1) [1893] 1 Q. B. 323.

(2) The Waterworks Clauses Act, 1847, after empowering (s. 48) every owner or occupier of a dwelling-house to lay pipes to communicate with the pipes of the undertakers, provides:—Sect. 53: "Every owner and occupier of any dwelling-house or part of a dwelling-house . . . . shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

(3) (1877) 2 Ex. D. 441.

(4) (1760) 2 Burr. 1005.

tender. At any rate, the company took up a wrong position. They raised a wrong point. They insisted they were entitled to make the trustee in bankruptcy pay for the arrears of water rate due from the debtor. Now here the debtor, on being adjudicated bankrupt, ceased to be the tenant or occupier of the shops which the trustee then took possession of with the view of carrying on the business for the benefit of the estate. The trustee, therefore, was in the position of an incoming tenant, and under s. 48 of the Metropolis Water Act, 1871, was entitled to a supply of water, and the water company could not claim payment from him of the arrears of the water rate. Under those circumstances, it seems to me that, although the company could insist upon his paying in advance for a future supply of water, they were wrong in insisting upon payment of the arrears. They therefore obtained that payment by insisting on something they ought not to have insisted upon, and the trustee paid under protest. In my judgment they must now restore the status quo, and must refund the money they obtained from the trustee under compulsion. Of course, they can insist upon payments in advance for the future. There will be an order for payment by the water company to the trustee of the 4*l.* 14*s.* 3*d.* with costs.

Solicitors for trustee: *Piesse & Son.*
Solicitors for water company: *Bircham & Co.*

H. L. F.

Applied. PERERA *v.* THE KING [1951] A. C. 482

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March 27, 28.

THE QUEEN *v.* GRAY.

Contempt of Court—Publication of Comments on Administration of Justice—Personal Abuse of Judge with Reference to his Conduct as Judge.

The publication in a newspaper of an article containing scurrilous personal abuse of a judge, with reference to his conduct as a judge in a judicial proceeding which has terminated, is a contempt of Court punishable by the Court on summary process.

HOWARD ALEXANDER GRAY appeared before the Court in obedience to an order made, upon the application of the Attorney-General, on the Crown side of the Queen's Bench Division, to answer for a contempt of Court committed by publishing in a newspaper—the *Birmingham Daily Argus*—an article headed "A Defender of Decency."

The facts appearing from the affidavits filed in support of the application, and admitted by counsel for Gray, were as follows:—

The Birmingham Spring Assizes commenced on March 13, and Darling J. sat in the Crown Court for the trial of prisoners. On March 15 one Wells was about to be tried before the learned judge for unlawfully and indecently publishing and uttering certain obscene and filthy words, and for unlawfully publishing and selling an obscene libel contained in a book. Before the trial of Wells was commenced Darling J. made some observations in Court, pointing out in substance that, whatever might be the rights of the case, it was inexpedient that the newspaper press should give anything like a full or detailed account of what passed at the trial, and that, although a newspaper had the right to publish accounts of proceedings in a law court, and for many purposes was protected for doing so, there was absolutely no protection to a newspaper for the publication of objectionable, obscene, and indecent matter, and any newspaper which did so might as easily be prosecuted as anybody else. The learned judge further said that, although he hoped and believed that his advice would be taken, if it was

disregarded he should make it his business to see that the law was in that respect enforced.

On March 16, after the trial of Wells, which resulted in his conviction, had been concluded and sentence passed, and whilst the Birmingham Assizes were still continuing and Darling J. was still sitting as one of Her Majesty's judges of assize, Gray wrote and published in the *Birmingham Daily Argus*, a newspaper circulating in Birmingham, of which he was the editor, the article in question, headed "A Defender of Decency."

It is thought unnecessary to set forth this article. It was written with reference to the observations made by Darling J. before the trial of Wells, and may be described in the words of Lord Russell of Killowen C.J. (1), as being "personal scurrilous abuse of the judge as a judge."

In an affidavit made by Gray himself he described the article thus: "In writing the article . . . . I used language referring to Mr. Justice Darling in terms which were intemperate, improper, ungentlemanly, and void of the respect due to his Lordship's person and office. . . . . I deeply regret the publishing of the article and the inexcusable and insulting language in which it referred to one of Her Majesty's judges, and I humbly apologise to his Lordship and to the Court for my conduct, which I now, upon consideration, see reflected not only upon the individual judge but upon the bench of judges, and the administration of justice."

Sir Richard Webster, *A.-G.* (*Henry Sutton* with him), stated the facts, and said that he was prepared with authority to shew that the publication of the article was a contempt of Court, and that the proper procedure had been adopted.

[LORD RUSSELL of KILLOWEN C.J. intimated that the Court were satisfied upon those points.]

Hugo Young, *Q.C.* (*Gilbert Tangye* with him), for Gray, said that he proposed to deal with the case on the merits, and not to argue the question whether or not a contempt of Court had been committed, and the right procedure adopted. He did not attempt to justify the language of the article, but stated

(1) Post, p. 40.

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circumstances and urged considerations which might induce the Court to deal leniently with Gray, pointing out (inter alia) that the article was written after the trial of Wells had taken place, and suggesting that the contempt was not of so serious a character as in *Skipworth's Case* (1), where the attack upon the judge was made with reference to a case then pending.

The Court ordered Gray to appear before them again on the following day.

March 28. The judgment of the Court (Lord Russell of Killowen C.J., Grantham and Phillimore JJ.) was pronounced by

LORD RUSSELL of KILLOWEN C.J. In this matter the Attorney-General, on Friday last, moved before my learned brothers who are now sitting with me for a rule calling upon Mr. Thomas Lancaster to shew cause why he should not be committed for contempt of Court by reason of the publication of an article in a paper called the *Birmingham Daily Argus*, and published on the 16th of the present month. It then appeared that Mr. Thomas Lancaster was the printer, and also the secretary and manager of the limited liability company which publishes at Birmingham the paper called the *Birmingham Daily Argus*. Yesterday when the matter again came before the Court the Attorney-General informed the Court that an affidavit had been put forward evidencing the fact that Thomas Lancaster was abroad at the time at which the article in question appeared, and that he was still abroad. At the same time, it was announced that Howard Alexander Gray was the editor and the writer, and the person solely responsible for the appearance, on March 16, of the article which is impugned as a contempt of Court. Howard Alexander Gray appears here in person, is represented by counsel, and submits himself to the judgment of this Court. The Court, therefore, is seised of this matter, and is now able to deal with it. The facts of the case are these—One Wells was indicted at the Birmingham Assizes for uttering and publishing certain indecent words, and for publishing an indecent book. The case came to be tried before Darling J., sitting

(1) (1873) L. R. 9 Q. B. 230.

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under the Queen's Commission of Oyer and Terminer at Birmingham. Before the trial the learned judge thought it right to call public attention to the nature of it, and the character of the evidence which would necessarily be brought forward—evidence of various matters which it was very undesirable, from every point of view, should be published. The learned judge thought it right to warn all persons concerned, including the press of Birmingham, against the publication of any of those indecent details, taking care, at the same time, that his observations should not in any sense prejudge the matter to be tried, because he was careful to point out that, although necessarily indecent matter would be put in evidence, it did not follow that the publication of it in the actual case necessarily constituted a criminal offence. The learned judge proceeded, after giving this warning, to point out the means existing in point of law for the punishment of persons who did publish indecent matter of the kind which might be probably given in evidence. I do not think for one moment that the learned judge meant at all thereby to insult the press of Birmingham. His warning may have been unnecessary. He may not have been aware of the fact, as shewing the good sense and the propriety of that body, that there was no publication of indecent matter in the reports of the preliminary proceedings before the magistrates. I think the probability is that he had in his mind the popular but erroneous impression that there is impunity for the publication by newspapers of any matter which takes place in a court of justice. His observations having been made on March 15, on the evening of the following day, and after the trial of the man Wells had taken place, resulting in his conviction, the article in question was published. It was read yesterday by the Attorney-General; I do not propose to read it again. Of its character there can be no question. No one has described it in terms of stronger condemnation than Howard Alexander Gray in the affidavit to which I shall presently call attention. It is not too much to say that it is an article of scurrilous abuse of a judge in his character of a judge—scurrilous abuse in reference to the conduct of the judge while sitting under the Queen's Commission,

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and scurrilous abuse published in a newspaper in the town in which he was still sitting under the Queen's Commission. It cannot be doubted—indeed it has not been argued to the contrary by the learned counsel who represents Howard Alexander Gray—that the article does constitute a contempt of Court; but, as these applications are, happily, of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of Court, and what are the means which the law has placed at the disposal of the Judicature for checking and punishing contempt of Court. Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L.C. characterised as "scandalising a Court or a judge." (1) That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of Court, and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism: I repeat that it is personal scurrilous abuse of a judge as a judge. We have, therefore, to deal with it as a case of contempt, and we have to deal with it brevi manu. This is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part. It is a jurisdiction, the history, purpose,

(1) *In re Read and Huggonson*, (1742) 2 Atk. 291, 469.

and extent of which are admirably treated in the opinion of Wilmot C.J., then Wilmot J., in his Opinions and Judgments. (1) It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt; because, if it is not a case beyond reasonable doubt, the Courts will and ought to leave the Attorney-General to proceed by criminal information. How, then, are we to deal with this matter? That it is a serious case no one can doubt, and I do not hesitate to say, speaking for myself and for my brethren, that, if it had not been for the conduct of Howard Alexander Gray since the publication of the article, and especially if it had not been for the affidavit which he has put before the Court for its consideration, we should all have thought it our duty to send Howard Alexander Gray to prison for a not inconsiderable period of time. But he has come forward and frankly acknowledged his own individual and sole responsibility in the matter. He has done more. He has, in the affidavit to which I have made reference, expressed—we hope and we believe sincerely—his regret for what he has done. In that affidavit he makes reference to the fact that other newspapers in Birmingham have made comments upon the conduct of the learned judge in question. I have to make this observation in that regard. So far as they have been at all adverted to, they were obviously comments of a very different character; but they are not before us, and we must assume that they are not before us, because the learned Attorney-General, in his discretion, did not think they were sufficiently serious to call the attention of the Court to them in order that its punitive jurisdiction might be exercised in regard to those responsible for their publication. After referring to this matter, Howard Alexander Gray, in his affidavit, says that he wrote the article under a strong feeling that sufficient trust had not been placed in the judgment, good taste, and discretion of the journalists and reporters for the press. He proceeds: "That was the only motive present to my mind in writing the article, and I wrote it on the impulse of the moment. In doing so, I used language referring to Mr. Justice

(1) *Rex* v. *Almon*, (1765) Wilmot's Opinions, 243.

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Darling in terms which were intemperate, improper, ungentlemanly, and void of the respect due to his Lordship's person and office. The expressions applied to Mr. Justice Darling were not deliberately intended to bring discredit on his Lordship, but were the outcome of my strong feelings. I know they cannot be justified, and I do not seek to justify them. I deeply regret the publication of the article, and the inexcusable and insulting language in which it referred to one of Her Majesty's judges, and I humbly apologise to his Lordship and to the Court for my conduct, which I now, upon consideration, see reflected not only upon the individual judge, but upon the bench of judges and the administration of justice, and I submit myself to the merciful consideration of the Court." Howard Alexander Gray, the judgment of the Court is that you pay a fine of 100*l.*, and a further sum of 25*l.* for costs, and that you be detained, and, if necessary, lodged in Holloway Gaol, until these sums be paid. (1)

Judgment accordingly.

Solicitor for Attorney-General: *The Solicitor of the Treasury.*

Solicitors for Gray: *Pepper, Tangye & Co., for Pepper, Tangye & Winterton, Birmingham.*

W. A.

(1) The numerous authorities which establish the jurisdiction at common law to punish, on the summary process of the Court, contempts committed by publishing scandalous matter of the Court itself as a Court will be found collected in *M'Leod* v. *St. Aubyn*, [1899] A. C. 549, at p. 551. In modern times this jurisdiction does not seem to have been exercised in England, although it has been in the Colonies. Lord Morris, delivering the judgment of the Privy Council in *M'Leod* v. *St. Aubyn*, said: "Committals for contempt of Court are ordinarily in cases where some contempt ex facie of the Court has been committed, or for comments on cases pending in the Courts. However, there can be no doubt that there is a third head of contempt of Court by the publication of scandalous matter of the Court itself. . . . Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism . . . . Committals for contempt of Court by scandalizing the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

The present case of *Reg.* v. *Gray* is reported as shewing that in this

[IN THE COURT OF APPEAL.]

C. A.

1900

Jan. 22; *March* 27.

PAYNE *v.* HOGG.

Prohibition—Inferior Court—Jurisdiction—Salford Hundred Court of Record Act, 1868 (31 & 32 *Vict. c. cxxx.*), *ss.* 6, 7.

"The cause of action" in the Salford Hundred Court of Record Act, 1868, s. 6, means the whole cause of action, and not merely the act or default which gives the plaintiff his cause of complaint.

Sect. 7 of the Salford Hundred Court of Record Act, 1868, enacts that "No defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes":—

Held (by the Court of Appeal, reversing the decision of a Divisional Court), that, the effect of the section being to give jurisdiction to the Salford Hundred Court in cases where the want of jurisdiction is not pleaded, a defendant, against whom judgment had been recovered in that court in default of appearance, and who had consequently not pleaded to the jurisdiction, was not entitled to a writ of prohibition on the ground of want of jurisdiction.

APPEAL of the plaintiff from an order of Cozens-Hardy J. at chambers granting a writ of prohibition directed to the high steward and head bailiff of the Salford Hundred Court, and to the plaintiff in the action, prohibiting them from further proceeding in the matter of the judgment obtained by the plaintiff against the defendant, and in the matter of the execution levied thereunder and the sale of the defendant's goods and chattels.

The jurisdiction of the Salford Hundred Court is regulated by 31 & 32 Vict. c. cxxx. (the Salford Hundred Court of

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country the Court will still, where the circumstances demand its action, exercise its jurisdiction to punish, on summary process, the contempt of "scandalizing the Court," although no contempt has been committed ex facie of the Court, or in respect of a case pending.

Where a contempt of Court is alleged to have been committed, the practice is now to issue an order on the Crown side of the Queen's Bench Division, directing the person accused to appear before the Court and answer for his contempt. This was done in *Onslow's and Whalley's Case*, L. R. 9 Q. B. 219. The procedure by writ of attachment seems to have been superseded.—THE REPORTER.

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Record Act, 1868), which gives jurisdiction in personal actions where the debt or damages sought to be recovered shall not exceed 50*l.*, "if the cause of action arise within the hundred." The action was brought upon a promissory note for 26*l.*, made at Buxton, a place not within the jurisdiction of the Salford Hundred Court, and payable at Manchester, which is within the jurisdiction; the defendant did not appear to the writ, judgment was signed against her in default of appearance, and execution subsequently issued upon the judgment. It did not appear on the writ that the note was made out of the jurisdiction. The defendant, not having entered an appearance, had not raised the objection to the jurisdiction of the Court by plea, as provided by s. 7 of the Act (1); but after the issue of execution she applied for and obtained at chambers the order for a writ of prohibition, against which the plaintiff now appealed.

C. A. Russell, Q.C. (*W. R. Warren* with him), for the plaintiff. After the decision in *Whitehead* v. *Butt* (2), that "cause of action" in the Salford Hundred Court of Record Act, 1868, means whole cause of action, it is impossible to contend in this Court that the cause of action arose within the jurisdiction of the Salford Hundred Court. But under the express pro-

(1) By the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 6, "The Court shall have authority to try (1.) personal actions, if the cause of action arise within the hundred, provided that the Court shall not, except by consent of the parties to be signed and filed as hereinafter mentioned, have cognizance of any action in which the debt or damages sought to be recovered shall exceed the sum of 50*l.* . . . . . Provided always that, if in the course of any action (unless a consent has been signed and filed as aforesaid) it shall appear or shall be made to appear upon oath to the judge or registrar that the debt or damages sought to be recovered in any such action . . . . exceeds 50*l.* . . . . . then the judge or registrar shall order all proceedings in such action to be stayed upon such terms as to payment of costs by the plaintiff or otherwise as to the judge or registrar may seem just, and such order shall have the effect of and be enforceable as a rule of Court."

Sect. 7: "Save and except as aforesaid, no defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the Court shall have jurisdiction for all purposes."

(2) (1891) 7 T. L. R. 609.

visions of s. 7 of the Salford Hundred Court Act, 1868, an objection to the jurisdiction can only be taken by special plea, and the section in terms gives jurisdiction when the defendant does not plead specially to it. That is the effect of the decision in *Chadwick* v. *Ball* (1), the only difference being that in that case the action proceeded to trial in the ordinary way. But default of appearance can make no difference as to the proper mode of objecting to the jurisdiction, and the statutory rule on that point must still apply. The section does not mean merely that a defendant who has pleaded in the action without specially pleading to the jurisdiction cannot object to the jurisdiction; the procedure there laid down is obligatory in all cases, and the objection can only be taken in one particular way.

[CHANNELL J. Has the Court jurisdiction or not between the issue of process and the time for pleading?]

Yes; it has jurisdiction so long as its jurisdiction is not objected to.

Pickford, *Q.C.*, and *Le Riche*, for the defendant. The order was right. The effect of s. 7 of the Salford Hundred Court Act is to put it beyond all doubt that if the defendant waives his objection to the jurisdiction, as he would do if he pleaded in the action without specially pleading to the jurisdiction, no question of discretion as to the granting of a prohibition can afterwards arise at all. If the defendant takes his chance of succeeding on the merits, he cannot afterwards turn round and say that the Court had no jurisdiction, even if the want of jurisdiction is apparent: this is the true effect of the decision in *Chadwick* v. *Ball*. (1) The case of *Jacobs* v. *Brett* (2) shews that a provision in the Mayor's Court Act that an objection to the jurisdiction shall only be taken by plea does not take away the jurisdiction of the High Court to interfere by prohibition; and the additional provision in the present Act that if the want of jurisdiction be not so pleaded the Court is to have jurisdiction for all purposes cannot mean that the defendant is obliged to plead before the High Court can interfere: such an interpretation would in effect take away the jurisdiction of the High Court altogether.

(1) (1885) 14 Q. B. D. 855. (2) (1875) L. R. 20 Eq. 1.

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[CHANNELL J. At what time does the inferior court get jurisdiction?]

When the defendant, by taking a step in the inferior court, has waived his objection to the want of jurisdiction; a mere appearance, in order to ascertain the nature of the plaintiff's claim, would not be such a waiver; but if he had done more, as by pleading to the claim without pleading to the jurisdiction, there would be a waiver, and the Court would get jurisdiction.

C. A. Russell, Q.C., in reply.

CHANNELL J. Having regard to the language of the statute, I think that this appeal should be dismissed. Upon the interpretation placed upon s. 7 in *Chadwick* v. *Ball* (1), that section undoubtedly does give jurisdiction to the Salford Hundred Court which that Court would not have had but for the latter part of the section. The question arises, at what stage of the action does that Court get jurisdiction in such an action as the present? It is clear that the Court had no jurisdiction when this writ was issued, for part of the cause of action arose out of its jurisdiction, whereas in the case of a local court the whole cause of action must arise within the jurisdiction; it is only possible to determine the time when the Court acquires jurisdiction from the language of this section. In *Chadwick* v. *Ball* (1) the Court of Appeal said that a defendant could not take his chance of success in the inferior court, and then, when the judgment had gone against him, turn round and apply for a prohibition on the ground of want of jurisdiction; substantially they said that if a defendant, having the power to make an election, elected not to take an objection to the jurisdiction, he could not afterwards repudiate the election he had made. I think that the section means that, if a defendant has pleaded without pleading to the jurisdiction, his right to object to the jurisdiction is gone; the only question is whether that meaning can be got out of the words used. Having regard to the language of the Court of Appeal in *Chadwick* v. *Ball* (1), and to the difficulties that would arise upon any other interpretation (as, for instance, that between the writ and the

(1) 14 Q. B. D. 855.

omission to plead the Court has a temporary and defeasible jurisdiction depending on whether the defendant chooses to plead to it or not), I think that the meaning I have suggested must be the proper one to place upon the section. In the result, I think that the Court has jurisdiction over an action from the time when the defendant is entitled to plead and has an opportunity of pleading to the jurisdiction, and does not do so; and it follows that when a defendant takes no step and does nothing whatever in the action he does not give jurisdiction to the Court. The only difficulty is that where the defendant omits to take the preliminary step of appearing to the writ, the time for objection to the jurisdiction has not arrived; but I think nevertheless that the interpretation we are placing on the section is the correct one.

BUCKNILL J. I am of the same opinion. In holding as we do, we are not deciding anything contrary to *Chadwick* v. *Ball* (1), and we may, in my opinion, properly put upon this section the interpretation that when a defendant who actually delivers a defence chooses not to plead to the jurisdiction, he cannot afterwards be allowed to object to it by way of prohibition. Here, however, the defendant has done nothing; she has not even appeared, and I think that she is not deprived of her right to a prohibition.

Appeal dismissed.

W. J. B.

The plaintiff appealed.

March 27. *C. A. Russell, Q.C.*, and *W. R. Warren*, for the plaintiff. First, the Salford Hundred Court had jurisdiction, because the claim was under 50*l.* and "the cause of action" within the meaning of the Salford Hundred Court of Record Act, 1868, s. 6, arose within the area of its jurisdiction. The case of *Whitehead* v. *Butt* (2), which concluded this question against the plaintiff in the Divisional Court, was wrongly decided and should be overruled. In the case of *Cooke* v. *Gill* (3), the question was with regard to a garnishee in the

(1) 14 Q. B. D. 855. (2) 7 T. L. R. 609.
(3) (1873) L. R. 8 C. P. 107.

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Mayor's Court, and turned really on the common law with regard to courts of inferior jurisdiction, and not upon the meaning of "cause of action" in an enactment like that in question. As against a defendant, the Mayor's Court of London Procedure Act, 1857, gives jurisdiction if the cause of action either wholly or in part arose within the City. It is submitted that, having regard to the terms of ss. 6, 7, and 50 of the Salford Hundred Court of Record Act, 1868, "cause of action" in that Act must mean what it was held to mean in *Jackson* v. *Spittall* (1), namely, not the whole cause of action, but the act or default on the part of the defendant which gives the plaintiff his cause of complaint, in this case the non-payment of the note. In *Read* v. *Brown* (2) the question was whether part of the cause of action arose within the City of London, and it was really unnecessary to determine whether "cause of action" meant the whole cause of action.

[They also cited on this point *Vaughan* v. *Weldon*. (3)]

Secondly, assuming that there was a want of jurisdiction which might have been made the subject of a plea, the Salford Hundred Court of Record Act, 1868, s. 7, expressly provides in the widest terms that, except in cases within the proviso to s. 6, the only mode of objecting to the jurisdiction shall be by plea, and that, unless the objection is raised by plea, the Court shall have jurisdiction for all purposes. The ground upon which the case of *Chadwick* v. *Ball* (4) was decided covers this case. Channell J. in the Court below seems to have found a difficulty in supposing that there could be a jurisdiction defeasible by plea, but it is submitted that there is really no practical difficulty about it. An analogous case may be taken by way of illustration from the old practice with regard to the exclusive jurisdiction of a County Palatine. In the case of a superior court, every action is assumed to be within its jurisdiction that is not shewn to be otherwise. So, in the case of an action in a superior court for a cause of action which arose within the jurisdiction of a County Palatine, if the defendant did not plead that jurisdiction, the superior Court could dispose of

(1) (1870) L. R. 5 C. P. 542.
(2) (1888) 22 Q. B. D. 128.
(3) (1874) L. R. 10 C. P. 47.
(4) 14 Q. B. D. 855.

the case, but, if he did, then the case was taken out of the jurisdiction of the superior Court.

Thirdly, there being no want of jurisdiction shewn on the face of the proceedings, the Court has a discretion with regard to granting a prohibition in a case like the present where the defendant has stood by and allowed the action to proceed to judgment.

[They cited on this point *Farquharson* v. *Morgan* (1); *Worthington* v. *Jeffries* (2); *Buggin* v. *Bennett* (3); *Mayor of London* v. *Cox*. (4)]

Pickford, Q.C., and *Le Riche*, for the defendant. The first point is really concluded in favour of the defendant by *Read* v. *Brown*. (5)

[They were stopped on this point by the Court.]

The second point is not concluded as suggested by *Chadwick* v. *Ball*. (6) In that case the defendant appeared and pleaded without pleading to the jurisdiction, and the action proceeded to judgment in the ordinary way. The case is not, therefore, an authority on the point which is raised in the present case, where the defendant never pleaded. It is contended that the effect of the section is merely to give jurisdiction where, the time for pleading having arrived, the defendant fails to plead to the jurisdiction, the idea being that, where the defendant has elected to fight the case out on the merits in the local court, it is unjust that he should afterwards have an opportunity of turning round and relying upon the absence of jurisdiction. The section in effect makes the failure to plead the absence of jurisdiction equivalent to consent to the exercise of jurisdiction, but, until the time for pleading comes, it has no application. The effect of adopting the plaintiff's construction of the section would be practically to put an end to all objection to the jurisdiction in actions for small amounts, because the expense of pleading to the jurisdiction would be too great in proportion to the amount at stake, and, if the defendant succeeded on that plea, there would be no jurisdiction to give him costs. This

(1) [1894] 1 Q. B. 552.
(2) (1875) L. R. 10 C. P. 379.
(3) (1767) 4 Burr. 2035.
(4) (1867) L. R. 2 H. L. 239.
(5) 22 Q. B. D. 128.
(6) 14 Q. B. D. 855.

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would be very undesirable, for it is a common instrument of oppression to sue defendants in distant courts for small sums. Upon the plaintiff's construction there must be a jurisdiction, though defeasible, when the writ issues. There are obvious difficulties in the way of such a construction. The Salford Hundred Court, for instance, has the powers of Order XIV. Suppose a plaintiff in a case like this took proceedings for summary judgment under that order. According to the section the defendant can only object to the jurisdiction by plea. If so, how can he defend himself on the ground of want of jurisdiction against proceedings under Order XIV.? Again an interlocutory injunction might in some cases be granted, and afterwards a plea to the jurisdiction might be pleaded, and it might turn out that there was no jurisdiction to grant the injunction. The object of the section was merely to provide that in a case such as *Broad* v. *Perkins* (1), where the action had been fought to judgment, there should be no prohibition.

Thirdly, it is submitted that, as a matter of discretion, a prohibition ought to be granted in this case. The cases in which the prohibition has been refused as a matter of discretion are cases in which the action had been fought on the merits and proceeded to judgment. The mere fact that a defendant ignorant of law and legal procedure allows judgment to go against her in default of appearance is no ground for the Court in the exercise of its discretion refusing the prohibition.

A. L. SMITH L.J. In this case an action was brought in the Salford Hundred Court upon a promissory note for 26*l.* payable in Manchester. The note was made in Buxton, which is outside the jurisdiction of the Court, but there was nothing upon the face of the writ to shew that the whole of the cause of action did not arise within the jurisdiction, and the case is not one which comes within the proviso to s. 6 of the Salford Hundred Court of Record Act, 1868. The writ, which was duly served upon the defendant, clearly informed her that, unless an appearance was entered within eight days, judgment might be signed against her in the action. The defendant

(1) (1888) 21 Q. B. D. 533.

undoubtedly owed the money sought to be recovered. It has never been suggested that she did not. That being so, she did not enter an appearance, and in due course the plaintiff signed judgment for the amount due on the note, and issued execution. After all those proceedings had been taken, the defendant applied for a prohibition which was granted by the learned judge at chambers. The Divisional Court on appeal affirmed his decision, and the plaintiff now appeals to this Court. The first question raised is as to the meaning of "the cause of action" in s. 6, sub-s. 1, of the Salford Hundred Court of Record Act, 1868. In my opinion it is now well settled by authority that in the case of a Court whose jurisdiction is limited to a certain area an expression of this kind means that all the matters which go to make up the cause of action must have arisen within that area; and the plaintiff's counsel was wrong in suggesting that what the late Master of the Rolls said in *Jackson* v. *Spittall* (1) to the effect that "cause of action" meant the act which gave the plaintiff his cause of complaint applied in the case of such a court. Though the note in this case was payable in Manchester, it was made in Buxton, and the making of the note was a material ingredient of the cause of action. We must therefore hold that, if the point had been raised by plea in accordance with s. 7 of the Salford Hundred Court of Record Act, 1868, that Court would have had no jurisdiction in this case. The question is whether, the case not coming within the proviso to s. 6 of the Salford Hundred Court Act and the action having proceeded to judgment in default of appearance as before stated, the defendant can now set up want of jurisdiction as a ground for prohibition, or is prevented from so doing by s. 7 of the Salford Hundred Court of Record Act, 1868. It was argued for the defendant here, and the Divisional Court has held, that the meaning of that section is that there shall be jurisdiction, if the want of jurisdiction is not pleaded when the time for pleading in the action comes, but not otherwise. I do not find words to that effect in the section, and I see no ground for reading them into it. It is true that in this case the time for pleading never came, but that was the

(1) L. R. 5 C. P. 542.

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defendant's fault. If she had thought fit, she might have appeared, and then she could have pleaded the want of jurisdiction. The defendant's contention really is that we must read the section as saying that no person shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, "if and when the time for pleading comes." I do not see how we can read those words into the section. In my opinion the effect of the section plainly is that, if a defendant wishes to object to the jurisdiction of the Court, he must appear and then raise the objection by special plea. It seems to me that this very point was really before this Court in *Chadwick* v. *Ball*. (1) It was there pointed out that the Salford Hundred Court of Record Act, 1868, s. 7, contains at the end words stronger than those of the Mayor's Court of London Procedure Act, 1857, s. 15, and the case of *Oram* v. *Brearey* (2) was overruled. The Divisional Court thought *Chadwick* v. *Ball* (1) distinguishable, but I cannot agree with them. In my opinion it covers this case. Baggallay L.J., in giving judgment in that case, referred to the distinction between the language of the two Acts, and, dealing with the very words in s. 7 which we have to construe, said: "But a further special provision is introduced into the 7th section of the Salford Act, and additional words are added on which I think this case depends. I cannot think that these latter words were intended merely to have the same effect as the earlier words. We must, I think, according to the established principles of construction, attribute some further meaning to them. They are as follows: 'And if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes.' There is no distinction there drawn between a stranger and a party to the suit with regard to the right to proceed by way of prohibition. The section says that the Court shall have jurisdiction for all purposes." In that case the defendant had pleaded, but had not pleaded the want of jurisdiction. I do not, however, think that makes any difference with regard to the true construction of the section. I think s. 7 absolutely prohibits every mode of raising the objection of want of jurisdiction except pleading it, and that

(1) 14 Q. B. D. 855. (2) (1877) 2 Ex. D. 346.

in my opinion clearly was the view taken by Baggallay L.J. Lindley L.J., after referring to the question whether a defendant in the Mayor's Court could obtain a prohibition under such circumstances as existed in the case before him, said: "However it is not necessary to decide that question, for I think the decision in this case may be placed on safer ground—viz., upon the words at the end of the 7th section of the Salford Hundred Court Act. . . . I think we must give some effect to those words beyond the effect given to the preceding words in the first part of the section. The language is peculiar: it does not say that the defendant shall not take advantage of the want of jurisdiction in arrest of judgment, or on a plea of the general issue, or otherwise: such matters are already provided for by the first part of the section. It says that the Court shall have jurisdiction for all purposes. These words seem to me entirely to meet the observations of Pollock B. in *Oram* v. *Brearey* (1), where he says that the jurisdiction of the superior Court is not to be ousted except by express provision. This enactment does not touch the question of the jurisdiction of the superior Court to prohibit where there is no jurisdiction in the inferior Court, because these words extend the jurisdiction of the inferior Court." The ground of the judgment in that case was that the effect of the section is to give jurisdiction except in a case where objection to the jurisdiction is taken by plea. I do not see how the present case can be taken out of that decision. My brother Channell seems to have found a difficulty in seeing how the Salford Hundred Court could have a defeasible jurisdiction before the time for pleading arrived; but I do not feel much difficulty about that. I think the illustration suggested in argument of an action brought in a superior court in respect of a cause of action arising in a County Palatine shews that there is no real difficulty in the matter. In such a case, there being nothing to shew where the cause of action arose, no difficulty occurred unless and until the question was raised by plea. So here there is nothing on the face of the proceedings to shew want of jurisdiction, and, the defendant not thinking fit to inform the Court of it, the Court proceeds to deal with

(1) 2 Ex. D. 346.

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the case, there being no reason apparent why it should not. It is the defendant's own fault that the want of jurisdiction did not appear.

Another point was taken—namely, that the Court had a discretion under the circumstances of this case with regard to granting a prohibition. I must say that, so far as my own discretion is concerned, I should not grant a prohibition where the defendant has acted as the defendant in the present case has done. For these reasons I think the appeal should be allowed.

COLLINS L.J. I am of the same opinion. With regard to the first question raised—namely, as to the meaning of "the cause of action" in s. 6 of the Salford Hundred Court of Record Act, 1868—I think it clear that it means the whole cause of action, as explained in *Cooke* v. *Gill* (1), and not "cause of action" as defined in *Jackson* v. *Spittall* (2), which latter case turned upon a special reading of the language of the Common Law Procedure Act, 1852, which uses the expression "*a* cause of action" and not "*the* cause of action," the expression used in the Act we are construing.

With regard to the second point, I have had some misgivings, but on the whole I think that the matter is concluded by the decision in *Chadwick* v. *Ball.* (3) In that case alternative contentions were put forward with regard to the construction of s. 7. One was that it merely laid down a rule of pleading in the Salford Hundred Court, and did not enlarge the jurisdiction of the Court in any way; that it merely defined the manner in which objection must be made to the jurisdiction of the Court in the court itself. That was the view taken by the Court in *Oram* v. *Brearey* (4), which was overruled. The other contention was that the section was one conferring jurisdiction, and not merely dealing with the question how the objection to jurisdiction must be taken in the court itself. This was the contention adopted by the Court. Though I can see a possible distinction between the case of *Chadwick* v.

(1) L. R. 8 C. P. 107.
(2) L. R. 5 C. P. 542.
(3) 14 Q. B. D. 855.
(4) 2 Ex. D. 346.

Ball (1) and the present case, I think it would be too subtle, and that, if we are loyally to accept the decision in that case, we must go the length of saying that it confers jurisdiction on the Salford Hundred Court in all cases, except those coming within the proviso to s. 6, unless objection to the jurisdiction is taken by plea. It was suggested by the defendant's counsel that a jurisdiction dependant upon a subsequent event, namely, whether a plea was pleaded or not, would be a curious kind of jurisdiction. I do not see any great practical difficulty in holding that the section confers a defeasible jurisdiction in actions for sums under 50*l.*, which can only be ousted by a special plea. Whether all the consequences which might follow from their decision were pointed out to the Court in *Chadwick* v. *Ball* (1) I cannot say, but there are considerations with regard to local courts which make me feel some hesitation in holding that it was intended to confer upon a local court like the Salford Hundred Court a jurisdiction unlimited in point of area, throwing upon the defendant the obligation of ousting that jurisdiction by plea. That, however, is matter for the Legislature to consider. So far as we are concerned, the Court of Appeal has, I think, already decided this point, and I think that decision was in accordance with the natural meaning of the words of the section. On these grounds I think the appeal should be allowed. I am also of opinion with regard to the question of discretion that under the circumstances of this case the discretion of the Court would be rightly exercised by refusing the prohibition. Buxton is close to Manchester, and the Salford Hundred Court is an excellent court. The defendant had a clear notice that, if she did not appear, judgment might be signed against her, and she nevertheless elected to stand by and allow judgment to be signed.

ROMER L.J. I agree in thinking that on two grounds this appeal should be allowed. The first ground is that I do not see my way to get over the plain words of s. 7. That section states in so many words that, except in cases coming within the proviso to s. 6, if the want of jurisdiction is not objected to

(1) 14 Q. B. D. 855.

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by special plea, the Court shall have jurisdiction for all purposes. That being so, when an action comes to be decided, and judgment has to be given according to the ordinary practice of the Court, if the Court finds that no plea objecting to the jurisdiction has been pleaded, and the case is not within the proviso to s. 6, the Court has jurisdiction; and if, having jurisdiction, it gives judgment, it is then too late to raise any objection to the jurisdiction. In order to oust the jurisdiction in such a case there must be a special plea before judgment. Here the defendant did not choose to appear; so in the ordinary course of the procedure of the Court the case came to be dealt with as in default of appearance. What was the Court to do? It was bound to deliver judgment having jurisdiction under s. 7, and judgment was given accordingly. It seems to me impossible after that for the defendant to raise an objection on the ground that there was no jurisdiction.

I think that there is another ground for refusing a prohibition in this case. The want of jurisdiction did not appear on the face of the proceedings, and therefore the Court has a discretion with regard to granting a prohibition. When I look at the circumstances of this case, I think that, if ever there was a case in which the Court ought in its discretion to refuse a prohibition, this is one. It is said that the judge at chambers did not exercise any discretion, but merely dealt with the question as one of law. I do not know how this may be; but, even if he did exercise his discretion, there is an appeal, the discretion to be exercised being a judicial discretion, and I think that in a case like this we ought to exercise our discretion by refusing a prohibition. I agree with the other members of the Court on the first point, namely, as to the meaning of "the cause of action" in the Salford Hundred Court of Record Act, 1868.

Appeal allowed.

Solicitors for plaintiff: *W. T. Harvey, for Theophilus E. Jones, Manchester.*

Solicitors for defendant: *Sims & Syms, for W. Burton, Manchester.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1900
March 29.

STREET *v.* STREET.

Practice—Costs—Reference of Action to Arbitrator—Costs of Reference, whether Taxable on High or County Court Scale—Reference whether by Consent or Compulsory—Order LXV., *r.* 12—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15.

An action of contract was referred by order of a district registrar, on the ground that it involved matters of account, to an arbitrator agreed on by the parties, and the order of reference provided that the costs of the action should abide the event of the award and the costs of the reference and award should be in the discretion of the arbitrator. The arbitrator awarded that an amount less than 50*l.* was due from the defendant to the plaintiff, and that the defendant should pay to the plaintiff his costs of the reference and award :—

Held, that the plaintiff was entitled to have the costs of the reference taxed on the High Court scale.

Moore v. *Watson*, (1867) L. R. 2 C. P. 314, disapproved of.

APPEAL from the order of Bigham J. at chambers refusing a review of the taxation of costs by a district registrar.

An action for a balance of 90*l.* alleged to be due upon a builder's bill for work done was brought in the Manchester District Registry, and upon a summons taken out by the plaintiff was referred by an order of the registrar, on the ground that the questions in dispute consisted of matters of account, to an arbitrator agreed on by the parties. The order of reference provided that the costs of the action should abide the event of the award, and that the costs of the reference and award should be in the discretion of the arbitrator. It further provided that upon the making of the award the plaintiff or the defendant, as the case might be, should be at liberty to enter final judgment according to the finding of the award and for all costs he might be entitled to under the order or the award. The arbitrator awarded that 33*l.* was due to the plaintiff from the defendant, and that the defendant should pay to the plaintiff the costs of the reference and award. Upon taxation the registrar allowed the plaintiff his costs of the reference on the High Court scale.

The defendant applied to the judge at chambers for a review

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of taxation on the ground that, the action being one founded on contract, and the plaintiff having recovered less than 50*l*., the plaintiff was by reason of the provisions of Order LXV., r. 12, only entitled to costs of the reference on the county court scale, but the learned judge refused the application.

H. Tindal Atkinson, for the defendant. This was a compulsory reference under the Arbitration Act, 1889, s. 14. It is true that a special referee or arbitrator can only be nominated by consent of the parties, but that does not prevent the reference from being compulsory. Therefore the principle of *Moore* v. *Watson* (1) applies. It was there held, in the case of a compulsory reference to a master under the Common Law Procedure Act, that the costs of the reference were really costs of the action, and therefore, the plaintiff in that case being disentitled by statute to the costs of the action, he was not entitled to any costs of the reference. If the costs of the reference are costs of the action, then they come within Order LXV., r. 12, and the plaintiff is only entitled to costs on the county court scale. *Moore* v. *Watson* (1) was doubted by Bramwell L.J. in *Galatti* v. *Wakefield* (2), but was distinguished on the ground that the reference in the latter case was by consent. It is submitted that the decision in *Moore* v. *Watson* (1) was correct. The view taken there was that, the reference being to an officer of the Court, whose award was by the terms of the Act to have the same effect as the verdict of a jury, it was merely a substitution of one mode of trial for another, and the costs of a trial before the master were as much costs of the cause as the costs of a trial before a jury. The same principle applies to a reference under the Arbitration Act, 1889, s. 14. By s. 15 of that Act a special referee or arbitrator is to be deemed to be an officer of the Court, and his award is made equivalent to the verdict of a jury. The order no doubt provides that the costs of the reference are to be in the discretion of the arbitrator, but that means that he is to say whether costs shall be paid, and if so which party is to pay them, but not on what scale they shall be taxed. In cases like

(1) L. R. 2 C. P. 314. (2) (1878) 4 Ex. D. 249.

Galatti v. *Wakefield* (1) the question was not on what scale the costs should be taxed, but whether the plaintiff was deprived of costs altogether; and it was obviously impossible, when the order of reference made by consent expressly provided that the costs should be in the discretion of the arbitrator, to hold that he had no discretion as to the costs. Here the question is, the arbitrator having exercised his discretion by awarding costs to the plaintiff, on what scale they shall be taxed. Cases in which the arbitration was by consent are not authorities on the present question, for there the power to grant costs arises entirely from the agreement of the parties, and is not dependent on the law as to costs of an action. Under the Arbitration Act, 1889, an arbitrator may, if he thinks fit, tax the costs himself, and, if he awards costs without doing so, he must be taken to have meant to award costs on the scale applicable by law to the case. [He also cited *Fergusson* v. *Davison.* (2)]

A. J. Ashton, for the plaintiff. This was clearly a reference by consent for the present purpose, for there is no power to refer an action to a special referee or arbitrator except by consent of the parties. No doubt in such cases the master or registrar on the hearing of the summons may say that, if a party refuses to agree upon a special referee or arbitrator, he will refer the action to an official referee; but that does not make the reference to a special referee or arbitrator a compulsory reference in law. The arbitrator being constituted by s. 15 of the Arbitration Act an officer of the High Court, in the absence of any mention by him of any scale of costs, the High Court scale must be taken to apply. This being a reference by consent, the case falls within the authority of *Galatti* v. *Wakefield* (1), and not that of *Moore* v. *Watson.* (3) It is submitted that the principle upon which the latter case was decided, namely, that the costs of a compulsory reference are costs of the action, is erroneous. The distinction between the costs of the action and those of the reference has long been recognised. The case of *Holland* v. *Vincent* (4), which does not appear to

(1) 4 Ex. D. 249.
(2) (1882) 8 Q. B. D. 470.
(3) L. R. 2 C. P. 314.
(4) (1853) 9 Ex. 274.

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have been cited in *Moore* v. *Watson* (1), turned upon that distinction. Order LXV., r. 12, is analogous to the provisions of s. 116 of the County Courts Act, 1888, and previous enactments of the same kind, and only applies to the costs of the action. The case of *Forshaw* v. *De Wette* (2) is exactly on all fours with the present case, and is a distinct authority in the plaintiff's favour.

H. Tindal Atkinson, in reply.

COLLINS L.J. This is an appeal from the decision of Bigham J. at chambers affirming the decision of a district registrar with regard to the taxation of costs. An action of contract was referred by an order of the registrar to an arbitrator agreed on by the parties, the order directing that the costs of the action should abide the event of the award, and the costs of the reference and award should be in the discretion of the arbitrator. The plaintiff recovered by the award of the arbitrator an amount less than 50*l.*, and therefore, by reason of the provisions of Order LXV., r. 12, he was not entitled to costs of the action on a higher scale than if the action had been brought in the county court. The arbitrator gave the costs of the reference and award to the plaintiff. Upon taxation the registrar allowed the costs of the reference upon the High Court scale, and the judge on appeal affirmed his decision. The defendant's counsel relied mainly on the case of *Moore* v. *Watson* (1), which was the case of a compulsory reference under the Common Law Procedure Act, 1854. It was there decided that in such a case the costs of the reference were to be treated as costs of the cause; and, although by the terms of the order referring the action they were to be in the discretion of the master who had directed that the defendant should pay them, nevertheless the right to those costs was governed by the statute 13 & 14 Vict. c. 61, s. 11, which debarred the plaintiff from recovering costs, the judgment being for a sum not exceeding 20*l.* That was the decision of a strong Court with regard to a compulsory reference, and the defendant's counsel contends that the present case is one of a compulsory reference,

(1) L. R. 2 C. P. 314. (2) (1871) L. R. 6 Ex. 200.

and therefore that decision governs it. The decision in *Moore* v. *Watson* (1) was criticised in *Galatti* v. *Wakefield*. (2) That was a case of an arbitration by consent. It was there held that, where an action is referred by consent to arbitration on the terms that the costs of the cause shall abide the event, and the costs of the award shall be in the discretion of the arbitrator, if the arbitrator decides in favour of the plaintiff, he may lawfully direct the defendant to pay the costs of the reference and award, although the plaintiff may be deprived of the costs of the cause under the County Courts Act, 1867, s. 5. It was in that case urged by counsel that the principle upon which *Moore* v. *Watson* (1) was decided was just as applicable to the case of a reference of an action by consent as to the case of a compulsory reference, that principle being that the costs of the reference were really part of the costs of the cause, and that, if the plaintiff were debarred by the statute from recovering the costs of the cause, he was debarred from recovering costs which, if rightly viewed, were part of the costs of the cause. It seems that, if that be the true principle, it is as applicable to the costs of the reference in the case of an action referred by consent as to the costs of a compulsory reference. But, in answer to the argument, Bramwell L.J. expressed an opinion that the principle so laid down was very technical and unsatisfactory. He said: "In order to establish this proposition reliance has been placed upon *Moore* v. *Watson* (1): it seems to me that that case is quite distinguishable from that before us: but I desire to add that, as at present advised, I do not agree with the decision: I however reserve my judgment, until the proper moment has come for determining whether it ought to be overruled." In the same case Brett L.J. treated *Moore* v. *Watson* (1) as distinguishable, but guarded himself against being supposed to approve of it. Cotton L.J. also abstained from pronouncing an opinion whether the decision in *Moore* v. *Watson* (1) was correct or not, but expressed himself in terms which rather seem to shew that he did not approve of it. Again, in the case of *Fergusson* v. *Davison* (3) Brett L.J. referred to *Moore* v.

(1) L. R. 2 C. P. 314. (2) 4 Ex. D. 249.
(3) 8 Q. B. D. 470.

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Watson (1) in terms from which it may be inferred that he did not approve of it. We have been referred by the plaintiff's counsel to an authority of considerable value on this point, namely, the case of *Holland* v. *Vincent* (2), which was prior to the case of *Moore* v. *Watson* (1), but was not referred to in that case, and which greatly supports the doubt expressed by Bramwell L.J. as to the soundness of that decision in *Galatti* v. *Wakefield*. (3) In that case the declaration was for goods sold and work and labour, and the pleas were, except as to 40*l*., parcel, &c., never indebted, payment, and set-off, and as to that amount tender. At the trial the cause was referred to arbitration, the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator found 17*l*. 1*s*. 6*d*. to be due to the plaintiff above the amount tendered, and ordered the costs of the reference and award to be paid by the defendant. The master taxed the plaintiff's costs both of the cause and reference on the lower scale provided by the Directions to the Masters of the Courts of Hilary Term, 16 Vict., where the sum recovered does not amount to 20*l*. A rule was obtained by the plaintiff for a review of taxation. The defendant's counsel on the argument of the rule having relied on *Wallen* v. *Smith* (4), Parke B. said: "The question in that case was not as to the costs of the reference, but as to the costs of the cause"; and in giving judgment he said: "None of us have any doubt that the Directions to the Masters of the Courts of H. T. 16 Vict. do not apply to the costs of a reference, but only to the costs of a cause." Alderson B. said: "The case of *Wallen* v. *Smith* (4) only decided that a recovery on a reference of a cause was a recovery in the cause so as to tax the costs of the cause on the lower scale." In that case a distinction was clearly drawn between the costs of the cause and the costs of the reference, and it is an authority that the latter are not costs of the cause. We were also referred by the plaintiff's counsel to the case of *Forshaw* v. *De Wette* (5), which is a distinct authority that in

(1) L. R. 2 C. P. 314.
(2) 9 Ex. 274.
(3) 4 Ex. D. 249.
(4) (1837) 3 M. & W. 138.
(5) L. R. 6 Ex. 200.

the case of a reference by consent the costs of the reference are not costs of the cause. In that case an action in which the declaration contained counts in trover and debt was referred by consent, and the costs of the cause were to abide the event of the award, and the costs of the reference and award were to be in the discretion of the arbitrator. The arbitrator awarded the plaintiff 2*l.* 10*s.* damages on the count in trover and 7*l.* 12*s.* 8*d.* on the count in debt, and directed that the defendant should pay the costs of the reference and award. It was held that, although the plaintiff had recovered less than 10*l.* in tort and less than 20*l.* in contract, and was therefore not entitled to the costs of the action, he was entitled to the costs of the reference and award. *Moore* v. *Watson* (1) was referred to in that case and distinguished on the ground that it was only applicable to compulsory references. It appears to me that both these cases, one of which was decided before *Moore* v. *Watson* (1) and one after, are, when analyzed, really inconsistent with the principle there laid down, for they are both authorities to the effect that the costs of the reference are not part of the costs of the action. It is very difficult to see any valid reason why that view is not as much applicable to a compulsory reference as to a reference by consent. In the present case the reference may perhaps be said to have been a compulsory reference in one sense, but it was a reference by consent in a most essential particular, because it was to a particular person to whom the action could not be referred except by consent. Where the parties agree that the reference shall be to a particular person, and that the costs of the reference shall be in the discretion of that person, I do not see how it can be said that the consensual portion of the reference is confined to the selection of the particular person, and does not include the provision which gives him a discretion as to the costs of the reference. It was obviously intended I think that the particular person consented to as referee should have the costs of the reference in his discretion. It appears to me that the order of reference, so far as the giving of a discretion to the arbitrator with regard to the costs of the reference is concerned, was consensual. Though the reference may be

(1) L. R. 2 C. P. 314.

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said to have been compulsory in the sense that it was competent to the registrar to order a reference of the action without consent, it was not competent to him to order a reference of it to this particular person. But, whether the reference was consensual or not, I think the result is the same. It appears to me that, having regard to the expression of opinion by Bramwell L.J. in *Galatti* v. *Wakefield* (1), which was not dissented from, but so far as I can see assented to by the other members of the Court, and the authority of the cases referred to by the plaintiff's counsel, the decision in *Moore* v. *Watson* (2) can no longer be considered a binding authority, and, even if the reference here were compulsory, the judgment of Bigham J. was correct and this appeal should be dismissed.

ROMER L.J. I agree. In the first place I think that such an order of reference as was made in the present case is an order of reference by consent within the meaning of the decision in *Galatti* v. *Wakefield* (1), and therefore a consent order for the purposes of the question which is before the Court on this appeal. If so, the case is clearly governed by the decision in *Galatti* v. *Wakefield*. (1) But I should be sorry to let the matter rest there. I think that this appeal should be decided on a broader ground—namely, on the meaning and effect of such an order, assuming that it was made compulsorily. The order provides that the costs of the action shall abide the event of the award, and that the costs of the reference and award shall be in the discretion of the arbitrator. I think that the order means what it says, and that it has the effect of leaving the costs of the reference in the discretion of the arbitrator in the true sense of the words. By such an order the costs of the reference are not in my opinion made part of the costs of the cause, but are left in the arbitrator's discretion; he can deal with them as distinct and apart from the costs of the action, and say what shall be done with regard to them, whatever may happen with regard to the costs of the action. I disagree, with all respect to the distinguished judges who decided *Moore* v. *Watson* (2), with the view taken by them in that case, and

(1) 4 Ex. D. 249. (2) L. R. 2 C. P. 314.

agree with that expressed by Bramwell L.J. in *Galatti* v. *Wakefield*. (1) The authority of *Moore* v. *Watson* (2) received from *Galatti* v. *Wakefield* (1) a great blow, from which it was unlikely it could ever recover, and I think it only remains for us to give it the coup de grâce. With regard to the point argued on the effect of Order LXV., r. 12, in my opinion that rule only concerns the costs of the action properly so called, and does not apply to the costs of the reference, which are left in the discretion of the arbitrator. These considerations, however, do not finally dispose of the case, for the question remains as to the way in which the arbitrator has exercised his discretion as to the costs of the reference. I see no sufficient reason for thinking that an arbitrator may not under such an order of reference as this, in the exercise of his discretion, in awarding costs direct on what scale they shall be taxed. I think the arbitrator in this case would, if he chose to exercise it, have a discretion to say that these costs should be taxed on the higher scale. The question is whether he has done so. The award is silent on the subject. The question, therefore, appears to me to narrow itself to this: What is the proper inference in relation to the matter to be drawn from the terms of the award, having regard to the surrounding circumstances? I think the proper inference is that the arbitrator intended to award costs on the ordinary scale in High Court actions—namely, on the High Court scale—and not that he intended to award them on any special scale, such as the county court scale. For these reasons I think that the appeal fails.

Appeal dismissed.

Solicitor for plaintiff: *G. Featherstone Johnson, for John A. Bradbury, Manchester.*

Solicitors for defendant: *Robbins, Billing & Co., for Nicholls, Harris & Lindsell, Manchester.*

(1) 4 Ex. D. 249. (2) L. R. 2 C. P. 314.

E. L.

Applied. CORKERY *v.* CARPENTER. [1950] 2 All E.R. 745.

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April 3.

CANNAN *v.* EARL OF ABINGDON.

Bicycle—Liability to Toll—"Carriage"—7 Geo. 3, c. lxiii.

By a special Act, passed in 1767, the owner of a bridge across the Thames, and his heirs and assigns, were authorized to take the following (amongst other) tolls for passage over the bridge: "For every coach, chariot, berlin, hearse, chaise, chair, calash, wagon, wain, dray, cart, car, or other carriage whatsoever with four wheels the sum of fourpence, and with less than four wheels the sum of twopence":—

Held, that a bicycle ridden over the bridge was a "carriage" within the meaning of the Act, so that the owner of the bridge was entitled to take the toll of twopence in respect of the bicycle.

SPECIAL CASE, stated in an action pursuant to a master's order and by consent.

The action was brought to recover money paid under protest by the plaintiff, and demanded from him as toll for passing over a bridge.

In pursuance of a special Act, 7 Geo. 3, c. lxiii., intituled "an Act for building a bridge across the river Thames from Swynford in the county of Berks to Eynsham in the county of Oxford," the then Earl of Abingdon, the defendant's predecessor in title, erected the bridge now known as "Swinford Bridge" in the highway leading from Oxford to Cheltenham in lieu of an ancient ferry, of which he was the owner and occupier, across the Thames.

The Act provided (inter alia) as follows:—

"For and in consideration of the great charges that he the said Earl of Abingdon, his heirs and assigns, will be obliged to defray in erecting the said bridge and repairing and supporting the same, and also the loss which he and they will sustain by the ceasing of the tolls of the said ferry, the said bridge when built shall be and is hereby vested in the said Earl of Abingdon, his heirs and assigns, for ever, and it shall and may be lawful to and for the said Earl of Abingdon, his heirs and assigns, from time to time and at all times hereafter to erect or cause to be erected a gate or gates turnpike or turnpikes and also a toll-house or toll-houses at near or upon the said bridge and

there to ask demand receive recover and take to and for his and their own proper use and behoof in respect of his and their charges and loss as aforesaid before any passage over the said bridge shall be permitted the several sums following, that is to say—

"For every coach chariot berlin hearse chaise chair calash wagon wain dray cart car or other carriage whatsoever with four wheels the sum of fourpence and with less than four wheels the sum of twopence.

"For every horse mare gelding mule or ass laden or unladen drawing or not drawing the sum of one penny.

"For every foot-passenger whatsoever the sum of one halfpenny.

"For every ox bull cow steer or heifer the sum of one halfpenny.

"And for every calf swine sheep or lamb the sum of one farthing.

Which said respective sums of money shall be demanded and taken in the name of pontage or as a toll or duty and the monies to be received as aforesaid . . . . are hereby vested in the said Earl of Abingdon, his heirs and assigns, and the same and every part thereof shall be paid to him or them accordingly, and the said Earl of Abingdon, his heirs and assigns, is and are hereby authorized by himself and themselves or by any person or persons appointed by him or them to levy the toll or duty hereby made payable upon any person or persons who shall after demand thereof neglect or refuse to pay the same as aforesaid, and he the said Earl of Abingdon, his heirs and assigns, shall and may deny and refuse to permit any passage over the said bridge until payment thereof . . . . Provided always that no toll shall be taken for the driver of any coach cart or other carriage aforesaid drawn by horses or other cattle, or for any person or persons riding in and bonâ fide belonging to the same, or for any one person riding upon one and the same horse gelding mare mule or ass, but in case two or more persons shall be riding upon one and the same horse gelding mare mule or ass then one person only so riding (at the option of the keeper or keepers of the said gate or gates) shall be

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excused from the said toll or duty, and all and every other person and persons so riding, and also all and every person and persons not bonâ fide belonging to such coach cart or other carriage as aforesaid, shall be liable to pay the same tolls and duties as if he she or they were passing on foot."

The plaintiff was a member of the council of the Cyclists' Touring Club, and the defendant was and is the owner of Swinford Bridge, and entitled to take the tolls prescribed by the Act.

In December, 1898, the plaintiff passed along a portion of the highway from Oxford to Cheltenham and over Swinford Bridge on five occasions in the following ways :—

(*a*) On a bicycle without any luggage or luggage carrier ;

(*b*) On a bicycle having a valise or bag fitted to its frame for carrying luggage ;

(*c*) On a tricycle without any luggage or luggage carrier ;

(*d*) On a tradesman's tricycle having a box fitted to its frame for carrying goods ;

(*e*) On a bath-chair tricycle in which another person was seated.

On each of those occasions the defendant by his servant, the keeper of the toll-gate on the bridge, refused to allow the plaintiff to pass over the bridge without payment of the sum of twopence as a toll, and the plaintiff paid that sum to the keeper on each occasion under protest in order to obtain passage over the bridge.

The questions for the opinion of the Court were, with what toll, if any, was the defendant entitled to charge the plaintiff by virtue of the Act when riding over the bridge in each of the manners—(*a*), (*b*), (*c*), (*d*), and (*e*)—set forth ante.

The special case provided (inter alia) that, if the Court should be of opinion that the defendant was entitled to charge the toll so charged by him, judgment should be entered for the defendant, with costs.

Alexander Glen (*Macmorran, Q.C.*, with him), for the plaintiff. Bicycles and tricyles are not covered by the language of the special Act. The tolls are not intended to be exhaustive, i.e.,

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to be payable in respect of everybody and everything which goes over the bridge, as might have been the case with respect to the tolls payable for the passage over the ancient ferry. For instance, the Act only applies to wheeled carriages; it does not include a sledge. The case of a bicycle or tricycle is casus omissus. In *Taylor* v. *Goodwin* (1) a person furiously riding a bicycle on a highway was held liable to be convicted under the Highway Act (5 & 6 Will. 4, c. 50), s. 78, which makes it an offence for "any person driving any sort of carriage" to drive the same furiously so as to endanger the life or limb of any passenger. The ground of the decision was that so to ride a bicycle was within the mischief of that Act. That case, it is submitted, is no authority on the construction of the special Act here. In *Williams* v. *Ellis* (2) a bicycle was held not to be a carriage under a local turnpike Act which, after specifying certain kinds of carriages drawn by horses, mules, &c., imposed tolls "for every carriage of whatever description, and for whatever purpose," which should be drawn or impelled by steam or other power or agency than being drawn by horses or other beasts of draught. The Court held that the ejusdem generis principle applied, and therefore that a bicycle was exempt from the tolls. That decision governs the present case. The same principle was applied by the Court of Appeal and House of Lords in *Plymouth, Stonehouse, &c., Tramways Co.* v. *General Tolls Co., Limited.* (3) Next, if the plaintiff could be charged toll at all, he was only liable to be charged as a foot-passenger —at any rate in respect of his passage over the bridge on the first three of the occasions specified in the case. He propelled himself across the bridge by his feet; the motive power is the same as if he were walking. [He also referred to *Hatton* v. *Treeby.* (4)]

Walter Shaw, for the defendant. The plaintiff was charged the proper toll on all the five occasions. The bicycles and tricycles on which he rode were "carriages" with less than four wheels within the meaning of the Act. In the *Plymouth*

(1) (1879) 4 Q. B. D. 228.
(2) (1880) 5 Q. B. D. 175.
(3) (1896) 75 L. T. 467; 13 Times L. R. 74; (1898) 14 Times L. R. 531.
(4) [1897] 2 Q. B. 452.

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Tram Case (1) the question was whether, under a special Act passed in 1767, tolls were payable in respect of the passage over a bridge of a tramcar. The Court of Appeal and House of Lords held that the tramcar was a "coach" within the meaning of the Act, and liable to toll as such. In the House of Lords Lord Halsbury L.C. and Lord Herschell pointed out that, having regard to the language of the special Act then under consideration, it was not intended that any vehicle of any kind should pass over the bridge toll free, and it was impossible to suppose that the Legislature intended to exempt from toll any new form of vehicle which thereafter might be employed. The same reasoning applies to the special Act in the present case, where the language used is nearly identical. The various kinds of carriages in use at the time the Act was passed are specified, and then are added the words "or other carriage whatsoever." Those words were intended to include everything which by its function is a carriage. The test is the function of the thing, not its motive power. A bicycle or tricycle, where the weight of the rider is borne on the wheels and not by his own feet, satisfies that test. The special Act imposes toll on such carriages as were then in common use, on horses and beasts of draught and burden, on foot-passengers, and on beasts which do not draw and are not beasts of burden. The provision as to carriages is distinct and separate, and the words "or other carriage whatsoever" were intended to cover other kinds of carriages, whatever their motive power, which might thereafter come into use. *Williams* v. *Ellis* (2) is distinguishable; the tolls in the first instance were imposed by the special Act upon horses, &c., drawing the specified vehicles, and not, as here, upon vehicles.

[He was stopped.]

BIGHAM J. I am of opinion that all the bicycles and tricycles enumerated and described in the special case are "carriages with less than four wheels," within the meaning of the Act of Parliament in question, and that they are therefore

(1) 75 L. T. 467; 13 Times L. R. 74; 14 Times L. R. 531.
(2) 5 Q. B. D. 175.

all liable to pay the toll of twopence. The framers of the Act no doubt did not contemplate anything in the nature of a bicycle or a tricycle, but the language of the Act does, I think, cover things such as bicycles and tricycles, which have come into existence since the Act was passed. The bicycle or tricycle is a thing which carries. It may carry a man, as a horse does, or a carriage does; it may carry luggage or goods as we know that tradesmen's tricycles do. It is, therefore, in my opinion, a carriage, and, being a carriage, it is made by the terms of the Act of Parliament liable to pay the toll. I do not think that any distinction can be made between the different classes specified in the case; they are all equally liable to the toll of twopence.

PHILLIMORE J. I am of the same opinion. I think that in this case, as in the *Plymouth Tram Case* (1), it was intended by the Legislature that all vehicles should pay toll, and I think that a bicycle or a tricycle is a vehicle or is a carriage. Any mechanical contrivance, which carries people or weights over the ground, carrying the weights or taking the people off their own feet, so that the foot of man and the body and trunk of man do not support his own weight or the weight of the burden carried, is, I think, a carriage, and I do not think it matters that the man who is carried gives his own propulsion to the carriage. If he got the propulsion by the application of levers worked with his hands, as one sees men doing in the streets, the case would be tolerably clear, and I think it makes no difference that he gets his propulsion by pedalling with his feet—an operation which is perfectly different from the operations of walking, running, or skating, in all of which he bears his own weight at the same time that he moves himself. I therefore come to the conclusion that a bicycle or tricycle is a "carriage," and that conclusion obviates the necessity of considering the distinctions which would otherwise be drawn between the various kinds of passage over the bridge specified in the special case. Speaking for myself, I conceive it impossible to say that

(1) 75 L. T. 467; 13 Times L. R. 74; 14 Times L. R. 531.

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Phillimore J.

the last two in the category—(*d*) and (*e*)—are not carriages. If I thought that a bicycle or tricycle when carrying a man was not a carriage, I should scruple to say that a bicycle or tricycle when it carried luggage was not a carriage. All such difficulties, however, are avoided by our saying that a bicycle or a tricyle is a carriage for all purposes.

Judgment for the defendant.

Solicitor for plaintiff: *Leslie J. Williams.*

Solicitors for defendant: *Witham, Roskell, Munster & Weld.*

W. A.

C. A.

1900

March 12.

[IN THE COURT OF APPEAL.]

NASH AND ANOTHER *v.* DE FREVILLE.

Bill of Exchange—Promissory Note—Note left in hands of Payee after Payment—Negotiation by Payee—Note obtained by Payee from Holder by Fraud—Note returned to Maker—Liability of Maker on Note—Holder for Value—Overdue Note—Holder "in his own right"—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 61.

In s. 61 of the Bills of Exchange Act, 1882, which enacts that when the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged, the expression "in his own right" is not used in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world.

The defendant gave three promissory notes to cover his indebtedness to the payee, and subsequently two more notes, in substitution for the first three and to cover further advances. All the notes were payable on demand and were given on the understanding that they should not be negotiated. The payee indorsed all five notes generally to the plaintiffs. After the payee had so negotiated the notes the defendant paid to him the amount due on the last two notes, but the defendant was not aware that the payee had parted with the notes, and did not ask for or receive any of them from him. At a later date the payee obtained the five notes from the plaintiffs by fraud, and handed them to the defendant. In an action by the plaintiffs on the notes:—

Held, that the defendant, when he received back the notes, did not become holder for value, since the previous satisfaction of the notes by him was not a consideration given by him when he received back the notes, and that as they were then overdue he acquired no better title than

the payee had while they were in his hands, and that the plaintiffs, being entitled to disaffirm the transaction between themselves and the payee, by which the latter obtained possession of the notes, could recover in the action.

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APPEAL from the judgment of Lord Russell of Killowen C.J. at the trial of the action without a jury.

The defendant employed a solicitor of the name of Peed, who from time to time made advances to the defendant. To cover these advances and certain disbursements the defendant gave to Peed on January 14, 1895, a promissory note for 800*l.*, on January 31, 1896, a note for 500*l.*, and on April 4, 1896, a note for 500*l.* These notes Peed undertook not to negotiate. On February 9, 1897, the defendant gave to Peed two notes for 1500*l.* and 2000*l.* respectively. These notes were given in substitution for the three notes already in Peed's hands, and also to cover further advances made by Peed, and these notes also were by agreement between Peed and the defendant not to be negotiated. The defendant did not ask for the return of the first three notes, and they were left in Peed's hands. All the five notes were made payable on demand to Peed or his order. In March, 1897, Peed negotiated all the five promissory notes with the plaintiffs for a sum of 4800*l.* by indorsing them generally and handing them to the plaintiffs. In July, 1897, the defendant paid to Peed a sum of 4000*l.* to meet the 3500*l.* and interest due on the two notes of February 9, 1897, but he did not ask for or obtain any of the notes from Peed. The defendant was ignorant of the fact that the notes had been negotiated, and thought they were still in Peed's possession. In September, 1897, at an interview between Peed and the plaintiffs, the sum of 5581*l.* was agreed upon as the sum due upon the five notes, and Peed gave a cheque for that amount, and the notes were handed to him. He then sent the five notes by post to the defendant, who received them on September 29, and, thinking the transaction was closed, burnt them. On the same day Peed absconded. The cheque that he had given to the plaintiffs was presented and dishonoured. The plaintiffs subsequently brought this action against the defendant, suing on the notes and for conversion. The Lord Chief

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Justice found as a fact that when Peed drew the cheque which he gave to the plaintiffs he knew that it would not be met, and did not intend that it should be, and was contemplating the perpetration of a fraud on the plaintiffs. He also found that the plaintiffs voluntarily and intentionally parted with the notes, intending to rely upon Peed's cheque which he had given in exchange for them. He held that by virtue of s. 61 of the Bills of Exchange Act, 1882, the notes had been discharged, the defendant having become the holder of them after maturity in his own right. (1) He therefore gave judgment for the defendant.

The plaintiffs appealed.

Feb. 13. *Herbert Reed, Q.C.*, and *Montague Lush*, for the plaintiffs. The notes were current when indorsed to the plaintiffs, and as against them could not then be considered as overdue: *Brooks* v. *Mitchell* (2); *Glasscock* v. *Balls*. (3) The plaintiffs, therefore, having taken them in good faith and for value, were the holders of them in due course at the time when they handed them to Peed and took his cheque. As against Peed the plaintiffs would clearly have been entitled to disaffirm that transaction on the ground of fraud. Therefore, unless the defendant can shew that he took a better title when Peed handed him the notes than Peed had himself, the plaintiffs must be entitled to succeed. The defendant did not take such a title, and therefore the plaintiffs must be entitled to disaffirm the transaction against him. The defendant was not placed in the position of a holder in due course of the notes by what took place between him and Peed. Peed could only give a better title than he himself had by negotiating the notes to a holder in due course. To put himself in the position of a holder in due course the defendant must shew that he gave value for the notes in good faith and took them before they were overdue: Bills of Exchange Act, 1882, s. 29, s. 30, sub-s. 2.

(1) 45 & 46 Vict. c. 61, s. 61: "When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged."

(2) (1841) 9 M. & W. 15.

(3) (1889) 24 Q. B. D. 13.

When he received the notes back from Peed he gave no fresh value for them. He had given the last two notes to cover the first three, and subsequently funds of his sufficient to cover the last two notes came to Peed's hands. A past consideration is not sufficient to make the defendant a holder in due course: Bills of Exchange Act, 1882, s. 30, sub-s. 2. Moreover the maker of a promissory note who receives the note back as paid, as the defendant did, does not thereby become a holder in due course, for the note is not negotiated to him in such a case, and a holder in due course is a person to whom the instrument is negotiated under the conditions mentioned in the Bills of Exchange Act, 1882, s. 29. Again, when the defendant received these notes back he must be considered to have taken them when overdue, for they were payable on demand, and by his own shewing he himself had already satisfied them long before: and therefore he would take them with notice, and subject to all equities. The notes have not been discharged by payment within the meaning of the Bills of Exchange Act, 1882, s. 59. The defendant could not be deemed to have paid them as against the plaintiffs within the meaning of that section when he received them back, for payment under that section can only be to the holder of the notes, and at that time the plaintiffs were the holders in due course of the notes. These notes were not discharged under s. 61 of the Bills of Exchange Act, 1882, for under that section a negotiable instrument is only discharged when the acceptor or maker is or becomes, at or after its maturity, the holder "in his own right." "In his own right" means when he becomes the holder as of right. It does not mean that in a case like the present, where the acceptor or maker has taken the instrument from a person who has obtained it by fraud, the instrument is discharged as against a holder in due course from whom it was so obtained. Upon that construction the section would apply if the defendant had stolen the notes from Peed or if, Peed having dropped the notes, the defendant had picked them up. In this case the defendant has not got the notes in his own right; he has only the defective title of Peed, which the plaintiffs are entitled to avoid. If the defendant took the notes

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when overdue, then he took subject to the defect in Peed's title: if the notes are not to be deemed overdue when he took them, then he cannot say that the notes are discharged under s. 61, because it only applies where the maker is or becomes holder at or after maturity. It is a general principle that, where of two innocent persons one must suffer through the fraud of a third person, he whose negligence or misplaced confidence has enabled the fraud to be committed must be the one to suffer. Here the defendant by leaving the first three notes in Peed's hands when the last two were given, and by not requiring the last two notes to be given back when they were satisfied enabled Peed to defraud the plaintiffs.

[They cited *De la Chaumette* v. *Bank of England* (1); *Attenborough* v. *Mackenzie*. (2)]

Rawlinson, Q.C., and *H. Dobb*, for the defendant. The defendant admittedly had no notice of the fraud committed by Peed when he received back the notes. Therefore (on the assumption that the notes cannot be considered as then overdue), if he gave value and had not been the maker of the notes, it is clear that he would have been a holder in due course. The fact that he was the maker of the notes cannot make his position worse than it would have been if he had been a stranger. The effect of s. 61 of the Bills of Exchange Act, 1882, is that the notes on getting into his hands were discharged. There was good consideration for the return of the notes. The notes having been satisfied, Peed was under a liability for not having returned them, and the discharge of that liability was a good consideration for the return: see *London and County Banking Co.* v. *London and River Plate Bank*. (3) The expression "in his own right" in s. 61 was inserted to exclude a case in which the acceptor or maker of a negotiable instrument becomes the holder of the instrument in a representative capacity. All that is necessary to bring a case within the section is that he should have become the holder honestly and for valuable consideration, and both those conditions are satisfied in the present case. Notes payable on

(1) (1829) 9 B. & C. 208; 32 R. R. 643.

(2) (1856) 25 L. J. (Ex.) 244.

(3) (1888) 21 Q. B. D. 535.

demand cannot be overdue. These notes were not "overdue" in the sense in which that expression is used in s. 36, sub-s. 2, of the Bills of Exchange Act, 1882: *Glasscock* v. *Balls*. (1) The expression "overdue" refers to an instrument that is not paid although payment has been demanded, but the only evidence of demand in this case is that these notes had been paid by the defendant. The notes, being payable on demand, were mature at once when issued. The expression "at or after its maturity" in s. 61 only means that the bill or note must be payable, not that it must be overdue. The transaction by which the notes were obtained by Peed from the plaintiffs was voidable at the election of the plaintiffs, having been procured by fraud, but was not void. Until it was disaffirmed the property in the notes was in Peed, and, the notes having been honestly received by the defendant from him for good consideration before disaffirmance of the transaction by the plaintiffs, they cannot now disaffirm the transaction as against the defendant.

The first three notes were satisfied by the last two, and they remained in the hands of Peed as the solicitor or at any rate as the agent for the defendant, the maker of them. There was nothing wrongful in their so remaining. The result of that was that they could not be reissued by reason of the stamp laws: *Glasscock* v. *Balls*. (1) Therefore, with regard to the first three notes, the plaintiffs cannot recover, the indorsement of them amounting to a reissue of the notes which was invalid. The other two notes were discharged by payment in due course by the maker within s. 59, sub-s. 1, of the Act. If the 4000*l*. had been paid to Peed by the defendant in September when he received back the notes, it could not be said that such a payment was not good consideration. What happened was that the payment had been made in July, and that Peed held the money for a definite purpose. Directly he got back the notes, whether by fraud or otherwise is immaterial, he applied the money that he had antecedently received, as it was his duty to apply it, in satisfaction of the notes, and this amounted to a payment by the defendant within the statute. By s. 27 (*b*)

(1) 24 Q. B. D. 13.

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an antecedent debt or liability is deemed to be a valuable consideration whether the bill is payable on demand or at a future time. If any estoppel existed, so that the defendant could not say that Peed was not entitled to negotiate the notes, it ceased when the plaintiffs ceased to be holders of them.

Montague Lush, in reply.

1900. March 12. A. L. SMITH L.J. read the following judgment:—In this case the plaintiffs, who are tailors and money-lenders, sue Major de Freville upon five promissory notes amounting in all to 5300*l.*, payable on demand, of which notes the defendant was the maker and a solicitor named Peed was the payee. These notes at one time had been in the plaintiffs' possession, though they had been fraudulently induced by Peed to hand them back to him, and the notes then got back into the defendant's hands, as hereafter will appear. There is also a count in trover.

This case is complicated, as ordinarily is the case when fraud intervenes in the matter of negotiable instruments; but, having heard excellent arguments on each side, for the reasons I will now state, I think the question in the cause is, Did the defendant, when he received the notes back into his possession from Peed, take them under such circumstances as to give him a better title to the notes than Peed had when he gave them back to the defendant? If the defendant had not a better title than Peed had, then the plaintiffs, in my judgment, can succeed in this action, aliter, if the defendant had.

Peed was a solicitor who for years had carried on business at Cambridge, and down to September 29, 1897, when he absconded and afterwards became bankrupt, was a man of unimpeachable credit and above suspicion. Between the years 1885 and September, 1897, inclusive, Peed was the trusted solicitor of the defendant, and from time to time made advances of money to and disbursements for the defendant, and in January, 1895, the defendant owed him for so doing about 800*l.* Peed then suggested that the defendant should give him a promissory note payable on demand by way of security for the debt. This the defendant did, and it was a note for 800*l.*

dated January 14, 1895, payable on demand in favour of Peed, and it was expressly agreed between the defendant and Peed that Peed should not negotiate or part with this note. For further advances and disbursements the defendant made two other notes payable on demand in favour of Peed, and handed them to him. The one was dated January 31, 1896, for 500*l.*, and the other was dated April 4, 1896, also for 500*l.*, and there was the like agreement about not negotiating or parting with these two notes. The reason for this agreement as to Peed not negotiating or parting with these notes was that the defendant did not then wish to be called upon to pay the amounts represented by them, it being anticipated, as turned out to be the case, that in the month of June, 1897, when the defendant's son would come of age, the defendant, by means of barring an estate tail, would be placed in funds.

In the next year—namely, upon February 9, 1897—the defendant gave to Peed two notes, the one for 1500*l.* and the other for 2000*l.*—i.e., for 3500*l.* in all, payable on demand and in favour of Peed. These two notes were given to and taken by Peed to pay off the first three notes for 1800*l.* and to cover further advances. These two notes were also by agreement between the defendant and Peed not to be parted with or negotiated by him. The defendant did not take back from Peed the first three notes thus paid by the defendant, but left them in Peed's possession, and this, as will be seen, was what enabled Peed to commit the fraud which he subsequently practised upon the plaintiffs as regards these three notes.

In the month of March, 1897, Peed, without the knowledge of the defendant, broke faith with him and negotiated all five notes with the plaintiffs, they paying to him the sum of 4800*l.* and taking a bonus of 500*l.* for so doing. These notes were indorsed by Peed, and he also deposited with the plaintiffs an insurance upon the life of the defendant's son. In June, 1897, the defendant's son came of age, the estate tail was barred, the defendant became possessed of funds, and a settlement of accounts was then come to between the defendant and Peed, and the only material fact as to this settlement is that the defendant then gave to Peed 4000*l.* wherewith to pay the two

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notes for 3500*l.* and interest. The defendant did not get back from Peed those two notes when he paid them, but left them in Peed's hands, as he had done when he paid the first three notes. By his doing so Peed was enabled to perpetrate the fraud he subsequently practised upon the plaintiffs as regards these two notes.

It is not denied that the plaintiffs, when they discounted the five notes for Peed, became holders of them in due course and for value, and without notice of anything which would have impeached the plaintiffs' title to sue the defendant or Peed upon these notes. That the plaintiffs could have sued the defendant upon these five notes I have no doubt, and the defendant would have been undefended. It is true that up to this point the plaintiffs have no cause of complaint and were in no way prejudiced by the defendant not having taken back the notes from Peed as and when they were paid; and, on the contrary, the plaintiffs, by reason of the notes not having been returned by Peed to the defendant when they were paid, have been enabled to discount the notes for Peed at the rates they did, and were also enabled to enrich themselves by the sum of 500*l.*, being the bonus they took when they discounted them for Peed. But the prejudice to the plaintiffs comes in later on. The plaintiffs pressed Peed for payment of the notes, but could not get payment, and upon September 28, 1897, this took place. Peed, desiring to have the notes back, gave to the plaintiffs his cheque for 5581*l.* in exchange for the notes which they then held for 5300*l.*, and also what the plaintiffs call a contango—whatever that may mean—amounting to 86*l.*, they preferring, I suppose, Peed's cheque coupled with the contango of 86*l.* to the signature of the defendant upon the notes with no contango. This, however, the plaintiffs were clearly entitled to do. The Lord Chief Justice finds, and I have no doubt correctly, "that the plaintiffs then voluntarily or intentionally parted with the notes, intending that Peed should take them, and intending that they should take and rely upon Peed's cheque which he had given in exchange for them"; and he also finds, and I think correctly, that "when Peed drew his cheque he knew that it would not be met, and he did not intend that it would

be met, and in point of fact he was contemplating the perpetration of a fraud upon the plaintiffs."

That Peed defrauded the plaintiffs is clear. What is the effect of this? Before I discuss this, I should state that Peed, when he thus got back the notes by means of his worthless cheque in exchange, at once placed them in an envelope and sent them to the defendant, who received them upon September 29, 1897, and knowing, as was the fact, that he had paid them long since to Peed, and not knowing that Peed had ever parted with them, put them into the fire and treated the matter as at an end. Upon October 1, 1897, Peed's cheque was returned to the plaintiffs marked "referred to drawer." The plaintiffs made no communication to the defendant upon the matter until some four months after the cheque was thus returned, and the question arises, in these circumstances, who has the better title to the notes, obtained as they were by fraud from the plaintiffs, who were the bonâ fide holders for value of the notes. Now, the notes having been obtained by Peed from the plaintiffs by fraud, although the property in the notes passed to Peed, the plaintiffs as against Peed were entitled to disaffirm the transaction on discovering the fraud, and, if, before the transaction with Peed was disaffirmed by the plaintiffs, the defendant had become holder in due course of the notes, it would then be too late in my judgment to disaffirm, so far as the defendant was concerned, and the plaintiffs could not then successfully sue the defendant either upon the notes or in trover; and the real question, therefore, as I have above stated, comes to this—Did the defendant, when he took the notes on September 29, 1897, from Peed, obtain a better title to them than Peed had? which means—Did he take them bonâ fide and for value and without notice of Peed's fraud and before they were due? For, if so, the defendant would in my judgment have taken a better title to the notes than Peed had, and a title which would prevail over that of the plaintiffs. That the defendant received back the notes bonâ fide and without notice of Peed's fraud is clear. The defendant, when he received the notes from Peed, knew nothing of Peed having ever parted with them, nor had he ever heard of the plaintiffs in the matter.

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That the defendant received back the notes before the fraud of Peed was discovered is clear, for he received them the day after the fraud was committed. But did he give value for the notes when he received them back, and did he take them from Peed before they were overdue? As to the question of value, what value did the defendant give for the notes when he took them back from Peed? He had given value for the first three notes when, upon February 9, 1897, he gave the second two notes to Peed in order to pay off the first three notes, and he gave value for the second two notes when he paid the 4000*l.* in July, 1897, to Peed to pay them off; but this was months before the fraud was perpetrated by Peed upon the plaintiffs and before the defendant got the notes back on September 29, 1897. When he got the notes back the defendant gave nothing for them. How can it be said then that he took back the notes for value? For he did not. If the case cited of *London and County Banking Co.* v. *London and River Plate Bank* (1) were to be held to apply to this case, we should have to hold that the defendant gave real value for the notes and then a supposed value over again for the same notes, which cannot be. But supposing the defendant did give value for the notes when he took them back, which in my opinion he did not, did he take the notes after they were due? I cannot see how it can be held that the defendant, when he received back the notes in September, 1897, though payable on demand, did not take them when overdue; for he must have known they were overdue if he thought about it at all, inasmuch as he had himself paid them off, the first three notes in February, 1897, and the last two notes in July, 1897. How can the defendant now say that they were not overdue in September, 1897, when he received them back? It seems to me that as the defendant did not give value for the notes when he took them back, and as, even if he did, the notes were then overdue, the defendant did not take a better title to them than Peed had, and that the plaintiffs, having disaffirmed, as they were entitled to do, the transaction with Peed, can maintain trover for the notes and bring an action upon the notes against the defendant, who has no better title

(1) 21 Q. B. D. 535.

to set up than that of Peed. I must point out that the difficulty which the defendant unfortunately is in arises through his own default in not getting the notes back from Peed when he paid them, thereby giving Peed the opportunity of cheating the plaintiffs as he did. It is a well-known principle of law that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it: see the well-known case of *Lickbarrow* v. *Mason* in vol. i. of Smith's Leading Cases; and *Babcock* v. *Lawson* (1), which contains matters very apposite to the present case.

In my opinion counsel for the plaintiffs are right in their construction of s. 61 of the Bills of Exchange Act, which was so much relied upon by the defendant's counsel, and that section does not apply to the present case, and the words "in his own right" do not mean in contradistinction to a representative right as argued for the defendant.

For these reasons I think that the appeal must be allowed, and that judgment must be entered for the plaintiffs.

COLLINS L.J. read the following judgment:—This case was very elaborately and ingeniously argued on both sides, but I think when the facts are understood it resolves itself into a simple question, and may be decided in accordance with the familiar principle laid down in *Lickbarrow* v. *Mason* (2), namely, "That wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." In the present case the defendant de Freville placed three promissory notes made by himself in the hands of Peed as security for sums due from the defendant to Peed, taking from him a promise not to negotiate them. He afterwards gave him two others in substitution for the first three, but suffered the first three to remain in Peed's possession. Peed, in violation of his promise, passed all five to the plaintiffs, innocent holders for value, who thereby acquired a good title against the defendant. The result of this was that the defendant, having handed to and left in the possession of

(1) (1879) 4 Q. B. D. 394. (2) (1787) 2 T. R. 63, at p. 70; 1 R. R. 425.

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Peed instruments on their face negotiable, was estopped from setting up against the plaintiffs any fact which as between the defendant and Peed would have debarred Peed from negotiating them. Peed after negotiating them obtained possession of them from the plaintiffs by fraud, and passed them back to the defendant without any fresh consideration, unless a consideration can be made out by implying a release given to Peed by the defendant of his right to complain of Peed having negotiated the notes: see *London and County Banking Co.* v. *London and River Plate Bank.* (1) Are the plaintiffs to lose their remedy against the defendant because the physical custody of the instruments has been transferred to him by the hand of Peed? Can the defendant under such circumstances take back the notes from Peed, otherwise than subject to the existing right of the plaintiffs, which he was estopped from denying before he got possession of the notes again from Peed? This seems to me primâ facie to come clearly within the general principle above stated, unless there is something in the law regulating bills of exchange to prevent it. I have purposely left out the ineffectual dealings between the defendant and Peed for the satisfaction of the defendant's liability on the notes, because, in my opinion, for reasons which I will now give, they do not affect the principle which I think will turn out, when the facts are analyzed, to be decisive as to both sets of notes, though they do not stand on precisely the same footing. The fact however that such payment or attempted satisfaction of the notes as between the defendant and Peed had taken place before the defendant resumed possession of them will, as I shall presently point out, make it still clearer that the defendant has no answer to the plaintiffs' claim.

First, then, as to the three notes originally given. They were fully negotiable in Peed's hands. They were delivered to him, not for safe custody, but as security, and the defendant had nothing but Peed's promise to protect him from their being negotiated. While they were thus in Peed's hands an arrangement was made whereby two new notes were to be taken by Peed in substitution for the first three, and two new notes were

(1) 21 Q. B. D. 535.

handed to him accordingly, though he was still allowed to remain in possession of the first three. This transaction has been treated by the Lord Chief Justice as not amounting to an extinguishment of these three notes so as to destroy their negotiability, and though counsel for the defendant, in whose favour the Lord Chief Justice decided, did not accept this view, I think it is sound, and that the two may well be deemed to have been taken in final satisfaction only if and when they were paid: see *Ex parte Barclay* (1); *Thorne* v. *Smith* (2); and, therefore, I will so treat it. When these notes, therefore, were negotiated by Peed, they were still current, and the defendant was estopped as against the plaintiffs from setting up any fact which would have defeated Peed's right to negotiate them: for instance, the fact that Peed was under a duty to the defendant to return them and not to negotiate them. Peed then having transferred them for value to the plaintiffs, gets them back by fraud from them and passes them on to the defendant. Obviously the plaintiffs could disaffirm the transaction by which Peed got possession against any one who could shew no better title than Peed. Did then the defendant when he opened the envelope containing the returned notes get a higher title against the plaintiffs than Peed had? In my opinion, clearly not. He remained bound by precisely the same estoppel that he was bound by before; no fresh fact had intervened to displace it. It is said that he has taken for value and without notice; but the only value that can be suggested is the somewhat artificial value based on the case of *London and County Banking Co.* v. *London and River Plate Bank* (3), namely, his implied release to Peed of his right against him in respect of his violation of duty in negotiating the notes; but it is precisely this duty which he is estopped from setting up against the plaintiffs. He cannot, therefore, as against the plaintiffs prove any consideration given for the notes. There were no circumstances founding any such estoppel in the case cited, and if there had been, the decision must have been different. The equities in that case were

(1) (1802) 7 Ves. 596. (2) (1851) 10 C. B. 659.
(3) 21 Q. B. D. 535.

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equal; the bank had done nothing to facilitate the fraud of their manager; and they were not debarred from protecting their possession by the somewhat fine-drawn consideration which was there implied out of the circumstances. Here the estoppel is raised by the handing to Peed by the defendant of negotiable instruments as such, which, as pointed out by Bramwell and Brett L.JJ. in *Baxendale* v. *Bennett* (1), is a very different thing from depositing for safe custody securities capable of being negotiated: see pp. 529 and 531 of the report; and, further, in the case of these three first bills, neglecting to resume possession of them. It would certainly be an extraordinary result if the payee who wrongfully negotiated the notes could by stealing them from the holder for value and replacing them in the possession of the maker get rid of the intervening title which was good against the maker before the theft.

Apart from the doctrine of estoppel which in my opinion governs this case, I think the defendant could not acquire from Peed a higher title than Peed had to give. The three notes came back to him at the end of September from Peed's custody, he knowing that as between himself and Peed the latter had received from him, in the previous February, other notes instead of them, intended as between himself and Peed to satisfy his liability on these notes, at all events, if the second set were paid; and he had put money in Peed's hands to pay these. Can he after such an interval receive back the notes, otherwise than subject to intervening rights, from the person in whose custody he had left them, in a negotiable condition, six months before, though he had given others in substitution for them, and furnished money to pay these last? Had he been an indorsee from Peed, and not himself the maker, and had known what had passed between Peed and the maker, he could not have acquired a better title than Peed. If he chooses to settle otherwise than in return for the notes themselves, can he, after an interval, receive the notes back from the person in whose custody he has left them in a negotiable condition, otherwise than subject to intervening rights? If, though maker, he

(1) (1878) 3 Q. B. D. 525.

has to rely upon a fresh consideration to support the transfer from Peed, why is he in a better position than an indorsee? He has to make title under a purchase for fresh consideration, given in respect of notes of which he knew that payment had been demanded, and an attempt at satisfaction made six months before.

There is authority that a note payable on demand is after demand overdue: see *Barough* v. *White* (1); *Bartrum* v. *Caddy*. (2) As soon as demand has been made the time for payment has arrived just as much as if the note had been made payable on a particular day which had passed. It is true that there is nothing on the face of the notes to shew that they are overdue, but had the facts known to the defendant been written on their face they would have appeared to be overdue or actually paid. How, then, can he get a better title than his transferor? For instance, if the fact of Peed's dealings had been communicated to the plaintiffs when they took the first three notes, could they have got a better title than Peed? Clearly not. But these are the facts known to the defendant when he gets back the notes, plus the additional fact that he has meanwhile paid the second set. He cannot displace the plaintiffs' title by virtue of his old right. He has got to shew a new transfer for good consideration without notice of infirmity, and this he cannot do because the notes came back to him as pieces of paper only, evidencing the fact that he had satisfied them. Could this be doubted if Peed had written on them as he might have done "paid" or "cancelled" before he put them into the envelope? These pieces of paper, therefore, as between the defendant and Peed, having lost their negotiable quality, are denuded of that element which alone makes it possible for a transferee to get a better title than his transferor.

With regard to the two substituted notes, I think the same principles apply. These were negotiated before any attempt at payment by the defendant. But, on such transfer to the plaintiffs, the defendant was equally estopped from setting up against the plaintiffs a breach of duty in Peed in negotiating. When he put Peed in funds to satisfy these notes, Peed was

(1) (1825) 4 B. & C. 325. (2) (1838) 9 A. & E. 275.

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not in fact the holder, and the defendant took no trouble to find out whether he was or not. Here, too, he is obliged to rely for consideration for Peed's transfer to him on the same constructive release of his claim against Peed; but admitting, as he has to do against the plaintiffs, that the plaintiffs took a good title to the notes, he cannot set up a duty in Peed, in derogation of that title, to return the notes otherwise than subject to it. The consideration therefore fails in this case also. Here, too, he receives back notes some two or three months after he had supposed he had satisfied them by the transaction in July, with the result, for the same reasons that I have already given as to the others, that he cannot get a better title than his transferor.

I have, I think, shewn that even if the defendant could be said to have given fresh consideration for the transfer from Peed, he could nevertheless in the circumstances acquire no better title than Peed. I have also, I think, shewn that, even if the suggested consideration could exist, the defendant would be estopped from setting it up against the plaintiffs. But I am further of opinion that, in the circumstances of this case, no such consideration in fact existed. There is no room for an implied consideration when one is proved in fact.

If some one steals my boots, and afterwards replaces them, one might perhaps—but not, I think, without some strain on the imagination—conceive that I impliedly release my right to complain of the theft, in return for the restored boots, though I did not know they had been stolen. But if I buy and pay for a pair of boots, and the bootmaker delays a fortnight before he sends them home, do I give two considerations for them—one when I pay for them, and a second when I receive them—or only one? It seems to me that in such case there is no need to search for an implied consideration. There is one in fact and only one, namely, the price. So here the only consideration given by the defendant was the sum which he paid in July, which entitled him as against Peed to a return of the notes.

It remains to consider the effect of s. 61. I agree with the argument of the learned counsel for the plaintiffs on this point.

"In his own right" must mean something more than "not in a representative capacity," as executor for instance. It could not possibly mean that if a thief stole the note from the holder and placed it in the possession of the maker, at or after maturity, the note should ipso facto be satisfied; and yet this would be the result if the words "in his own right" are to bear the limited meaning suggested. I think "in his own right" must mean having a right not subject to that of any one else but his own—good against all the world.

On the whole, therefore, I think in this case there is no technical difficulty to prevent the application of the broad principle which I have named; that the defendant is "he who has enabled" Peed to occasion the loss; that he must, therefore, sustain it; and that the judgment of the Lord Chief Justice ought to be reversed.

As to estoppel being the foundation of rights arising upon unauthorized transfers of negotiable instruments, see Lord Mansfield in *Russel* v. *Langstaffe* (1), Tindal C.J. in *Schultz* v. *Astley* (2); and *Ingham* v. *Primrose* (3), impugned by Brett L.J. in *Baxendale* v. *Bennett* (4), but decided in a considered judgment by a very strong Court, not questioned so far as I know elsewhere, and at all events sound in principle if wrong on the facts.

ROMER L.J. read the following judgment:—In the course of the argument before us, many points, some of considerable difficulty, were raised and discussed. But I think that the question raised on this appeal can be, and ought to be, decided on comparatively simple considerations. It is clear that, before Peed obtained the promissory notes from the plaintiffs by fraud, the defendant was liable to the plaintiffs upon those notes. Now, the notes were obtained from the plaintiffs by Peed and sent on by him to the defendant without the defendant taking any part or step in the matter, or having any communication of any kind with Peed. Peed alone carried the

(1) (1780) 2 Doug. 514.
(2) (1836) 2 Bing. N. C. 544.
(3) (1859) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.
(4) 3 Q. B. D. 525.

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transaction through, and the defendant was simply the passive recipient of the notes when they were forwarded to him by Peed. This being so, it does not appear to me just that the defendant should be able to say, as against the plaintiffs, that he can avail himself of the fraud of Peed, by which alone the notes came to the defendant's hands, so as to discharge him from his pre-existing liability on the notes to the plaintiffs. I cannot think it right to hold that Peed's fraud has had the effect contended for by the defendant. It appears to me, when the facts of the case are duly appreciated, that legal considerations prevent us from so holding. For the plaintiffs when they discovered the fraud of Peed were entitled to have the notes re-delivered to them, and the only question is whether the defendant acquired as against the plaintiffs a better title to the notes than Peed. In my opinion he did not. For in truth and in fact the act of Peed, after he obtained the notes from the plaintiffs, in forwarding them to the defendant, was, so far as the plaintiffs are concerned, a voluntary act on his part. As already pointed out, the defendant took no conscious part whatever in or about this act of Peed, and did not even know that it was about to be performed. The defendant, after Peed acquired the notes, did not then pay the notes, or purchase them, or bargain for their delivery. The notes were simply forwarded by Peed to the defendant, and accepted by him as notes which had long since been paid, and not as notes which in Peed's hands, so far the plaintiffs were concerned, were current notes. The only possible consideration for the delivery by Peed to him which the defendant can allege is the fact that as between himself and Peed the notes had been previously discharged; that is to say, discharged while the notes were in the plaintiffs' hands as current notes, and that is precisely a consideration which the defendant could not set up as against the plaintiffs in respect of their rights against him upon the notes.

It appears to me that, under the peculiar circumstances of the case, the defendant cannot say, as against the plaintiffs, that he is to be regarded as having become a holder for value of the notes from Peed, although as between the defendant

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and Peed alone the defendant was entitled to receive the notes. And further, in my opinion, so far as he is concerned, the defendant can only be regarded as acquiring the notes from Peed as notes which were paid and no longer current, and, this being so, he can only take them subject to all the equities attaching to the notes in Peed's hands, including the rights of the plaintiffs to have the notes handed back to them as notes upon which the defendant was liable.

For these short reasons it appears to me that the plaintiffs are entitled to hold the defendant as liable for the amount of the notes, and that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Chester & Co.*

Solicitors for defendant: *Cole & Jackson, for Francis, Francis & Collin, Cambridge.*

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1900 *April* 6.

OSBORN *v.* VICKERS, SONS & MAXIM.

Employer and Workman—Notice of Accident not given—Examination of Workman by Medical Practitioner, Right of Employer to—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 2; *First Schedule, s.* (3.).

Where a workman, who took proceedings under the Workmen's Compensation Act, 1897, had not given notice of the accident as required by s. 2 of the Act, but the employers raised no objection to his claim on that ground:—

Held, that, although the workman had not given notice of the accident, the employers were entitled to require him to submit himself for medical examination in pursuance of s. (3.) of the First Schedule to the Act; and that the county court judge had no jurisdiction to impose any term upon them as a condition of the workman's being bound to do so.

APPEAL from the decision of the judge of the Leeds County Court upon a point of law arising on a claim for compensation under the Workmen's Compensation Act, 1897.

The respondent, Osborn, was a workman who sustained

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injury from an accident arising out of and in the course of his employment by the appellants, Vickers, Sons & Maxim. He did not give notice of the accident as required by the Workmen's Compensation Act, 1897, s. 2. The appellants made him a weekly allowance for some time after the accident, but, being advised by the medical man employed by them that he had completely recovered from the effects of the injury, they ceased to do so. The respondent thereupon filed in the county court a request for arbitration to assess the compensation payable to him by the appellants under the Workmen's Compensation Act, 1897. The appellants in their answer took no objection to the claim on the ground that there had been no notice given of the accident, but alleged that, the respondent having recovered, they were not liable to pay any further compensation than they had already paid. The appellants having required the respondent to submit himself for examination by a medical practitioner employed by them in accordance with the Workmen's Compensation Act, 1897, First Schedule, s. (3.), he refused to do so unless the appellants would pay for the attendance at the examination of a medical practitioner on his behalf as well as the medical practitioner employed by them, which they refused to do. On the day fixed for the hearing the appellants applied to the county court judge by whom the matter was to be settled to suspend the proceedings, on the ground that the respondent had refused to submit himself for examination by a medical practitioner as required by them. The county court judge ordered that he should so submit himself, on condition that the appellants would pay the fee of one guinea for the attendance at the examination of a medical practitioner on the respondent's behalf, and adjourned the hearing. (1)

(1) The Workmen's Compensation Act, 1897, First Schedule, s. (3.), provides that, "Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and, if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place."

Ruegg, Q.C., and *Arthur Sims*, for the appellants. The Workmen's Compensation Act, 1897, First Schedule, s. (3.), provides that, if the workman refuses to submit to a medical examination as therein mentioned, the right to compensation and the proceedings shall be suspended until such examination takes place. The county court judge had no jurisdiction to impose any such condition as he did by way of limitation of the absolute right conferred by the statute on the appellants. The workman cannot omit to give notice of the accident relying upon the provision of s. 2, sub-s. 1, of the Act, which excuses the want of notice, if it be found that the employer is not prejudiced thereby, and then contend that, because no such notice was given, s. (3.) of the First Schedule does not apply, and he is therefore not obliged to submit to a medical examination; for it is obvious that the want of notice would then be to the prejudice of the employer.

Israel Davis, for the respondent. Sect. (3.) of the First Schedule to the Workmen's Compensation Act, 1897, in terms only applies where a workman has given notice of an accident, and therefore its provisions are not applicable to this case where no such notice was given. The result of the absence of such a notice is that s. (3.) of the schedule does not apply; but when the case comes before the county court judge the whole matter is in his discretion, and it is for him to determine whether the employers are prejudiced, and to what extent, and what the justice of the case requires as between the parties. He may, therefore, in such case impose any term he thinks reasonable on the employers; and under s. (6.) of the Second Schedule to the Act he has power to make any order he may think just as to any costs incident to the proceedings.

COLLINS L.J. I am of opinion that the decision of the county court judge in this case was wrong. The 2nd section of the Workmen's Compensation Act, 1897, provides that "proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such

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accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death: Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause." In this case no objection was taken by the employers to the claim for compensation on the ground that no notice was given of the accident. The contention for the respondent is that, having started the proceedings to obtain compensation without having given any notice of the accident as required by s. 2, and the appellants not having taken any objection to the proceedings on that ground, the respondent is entitled, in answer to the appellants' claim that he should submit to a medical examination under s. (3.) of the First Schedule to the Act, to turn round and say that the giving of a notice of the accident is a condition precedent to the obligation to submit to a medical examination under the section. I think that this is an impossible position for the respondent to take up. The want of notice prior to the proceedings is only cured on the assumption that the appellants are not prejudiced by it, and the appellants, though they may have waived the want of notice as a bar to the proceedings, have not thereby waived their right to any matter the absence of which may prejudice them in their defence. The respondent can only be admitted to carry on the proceedings subject to the obligation to submit himself to the medical examination to which he would have been subject if they had been duly preceded by the notice required by the Act. Under the provisions of s. (3.) the appellants had a right to demand that the respondent should submit to the medical examination therein mentioned, and I do not think that the county court judge had any jurisdiction to impose upon the appellants such a condition as he did. I do not say that there might not be special circumstances in a case, rendering it so essential to the well-being of the person to be examined to have some medical man conversant

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with his constitution and state of health present at the examination, that it might be considered a necessary part of the examination that such a person should be present. Possibly such a case might arise. But in the present case there are no such special circumstances, and in my opinion, in imposing the condition which he did, the county court judge acted ultra vires.

VAUGHAN WILLIAMS L.J. and ROMER L.J. concurred.

Appeal allowed.

Solicitors for appellants: *Campion & Co., for Clegg & Son, Sheffield.*

Solicitors for respondent: *Halses, Tristram & Co., for A. Muir Wilson, Sheffield.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1900 *April* 6.

STUART *v.* NIXON & BRUCE.

Employer and Workman—Employment for less than Two Weeks—Death caused by Accident—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *First Schedule* (1.) (*a*), (*i.*).

The dependants of a workman whose death has been caused by an accident arising out of and in the course of his employment are not entitled to compensation under the Workmen's Compensation Act, 1897, unless the workman at the time of the accident has been for at least two weeks in the employment of the employer.

Lysons v. *Andrew Knowles & Sons, Limited*, [1900] 1 Q. B. 780, followed.

APPEAL from the decision of the judge of the county court of Lancashire, holden at Liverpool, on a point of law arising on a claim for compensation under the Workmen's Compensation Act, 1897.

The appellant claimed compensation as the widow, and personal representative, of a workman, whose death had been occasioned by an accident, while he was in the employment

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of the respondents, who were stevedores, as a dock labourer. At the time of the accident he had been in the employment of the respondents five days consecutively at daily wages. The county court judge held that, the deceased having only been in the employment of the respondents for less than a week, the appellant was not entitled to compensation under the Act. (1)

Leslie Scott (*Joseph Walton, Q.C.*, with him), for the appellant. The decision in *Lysons* v. *Andrew Knowles & Sons* (2) does not govern the present case. That case turned on the Workmen's Compensation Act, 1897, First Schedule (1.) (*b*), which deals with the case of a workman totally or partially incapacitated by an accident. That sub-section only provides for a weekly payment calculated upon the workman's average weekly earnings, and it was held that that provision could only be applicable where there had been employment for more than one week, so as to make it possible to average the weekly earnings. Any observations made in that case tending to the conclusion that the Act as a whole does not apply to a workman who has not been in the employment of the employer for two weeks were only obiter. The same difficulty does not arise under First Schedule (1.) (*a*), (i.), which deals with the case where the accident has resulted in the death of the workman, and he leaves dependants, because in that case alternative amounts are mentioned, one being a minimum of 150*l*. It is submitted that the effect of the operative part of that sub-section is to provide that the compensation is to be either three

(1) By the Workmen's Compensation Act, 1897, First Schedule (1.), "The amount of compensation under this Act shall be (*a*) where death results from the injury--(i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer."

(2) [1900] 1 Q. B. 780.

years' earnings or 150*l.*, whichever of those sums is the larger, subject to the limitation that the compensation is not to exceed 300*l.*; and all that follows the words "provided that" must be read as governed by those words. The words from "and if" to the end are only applicable where it is a question of calculating whether the compensation in the case of an employment for less than three years is to be more than 150*l.* They do not take away the right given by the previous part of the subsection to a minimum of 150*l.*, and are inapplicable where no question of such a calculation arises. The enactment cannot be construed grammatically otherwise, for the latter part of it contains no words stating that the compensation is to be the amount of the earnings therein mentioned.

Ruegg, Q.C., and *A. G. Steel*, for the respondents, were not called upon.

COLLINS L.J. I am of opinion that this appeal should be dismissed. The question raised is whether the case of a workman, who has, to take an extreme case, only been in the employment of the employer for one day, and has met his death from an accident arising out of and in the course of that employment, comes within the Workmen's Compensation Act, 1897, so as to render the employer liable to pay compensation under that Act. It is contended that, although this Court has decided in the case of *Lysons* v. *Andrew Knowles & Sons* (1) that, where a workman, who had been employed for a period of less than two weeks, met with an accident not resulting in death, the case was not within the Act, the fact that the accident did so result in the present case takes it out of that decision. It was said by the appellant's counsel that, in so far as the judgments in *Lysons* v. *Andrew Knowles & Sons* (1) proceeded on grounds applicable to the present case, they were merely obiter, and did not govern this case; and that the appellant was entitled to compensation under the Workmen's Compensation Act, 1897, First Schedule (1.) (*a*), (i.). Speaking for myself, I certainly arrived at the conclusion to which I came in the case of *Lysons* v. *Andrew Knowles & Sons* (1)—and

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I think my brother A. L. Smith did so also—on the ground that, looking at the provisions of the Workmen's Compensation Act, 1897, as a whole, the Legislature could not have intended that a workman who had been employed for a less period than two weeks should be within the Act at all. I am not pressed by the difficulties suggested by the appellant's counsel with regard to the construction of the First Schedule (1.) (*a*), (i.). It does not appear to me that there is any extraordinary difficulty in construing it. On the contrary, I think that, taking it as a whole, its construction is reasonably simple. In dealing with the compensation to be given under the Act, it in the first instance contemplates, as a standard of such compensation, the amount of three years' wages, and assumes therefore that the workman has been continuously in the employment of the same employer for the period of three years. On that hypothesis it provides that, if during that period his earnings have amounted to, or exceeded the sum of 300*l.*, that sum shall be the amount of the compensation to his dependants; but, if his earnings have fallen short of that sum, then the compensation shall be the amount which he has earned, subject to this, that in any case it shall not be less than 150*l.* So far the clause proceeds on the hypothesis that the employment has lasted three years. Then it proceeds to deal with the case in which the employment has not lasted three years. In that case the compensation is to be arrived at by multiplying by the number 156 the amount of the workman's average weekly earnings during the period for which he has actually been employed. The number 156 is obviously fixed upon as being the number of weeks in a period of three years, and therefore the amount of compensation under this part of the clause may be looked upon as fixed with reference to the earnings during a hypothetical period of three years' employment. There does not seem to me to be any extraordinary difficulty about the scheme of the enactment. It gives two standards of compensation, one based on the earnings during an actual period of three years' employment, subject to a maximum and minimum amount, and the other based on the multiplication of the average weekly earnings by 156, the number of weeks in three years. But the latter standard

involves the hypothesis that the workman must have been in the employment of the employer for at least two weeks, by which I do not mean that he must have been in that employment for every day of the two weeks, but that he must have been so employed during two weeks that his earnings can be averaged with reference to that period. I need not go again all through the reasoning upon which the judgment in *Lysons* v. *Andrew Knowles & Sons* (1) was based; I still adhere to that reasoning. It would be most anomalous to hold that, at the time when the workman in this case met with this accident, he was in the position that, if he met with an accident in the course of his employment which caused his death, his dependants would get 150*l.* compensation, but, if he met with an accident which caused him injuries short of death, he could get nothing. In my opinion this case is governed by the decision in *Lysons* v. *Andrew Knowles & Sons.* (1)

VAUGHAN WILLIAMS L.J. I agree. Sometimes the plain words of an enactment compel one to arrive at a conclusion which it is difficult to reconcile with any principle, and which appears to draw arbitrarily a hard and fast line; but it does not follow from the difficulty one may feel in reconciling the conclusion so arrived at with any principle that one ought not to take into consideration in construing other words in the same Act which may be ambiguous the words so construed in accordance with their plain meaning, and to draw all reasonable conclusions which may arise from the fact that the enactment does contain those words. Bearing that consideration in mind in reference to the present case, I find that in *Lysons* v. *Andrew Knowles & Sons* (1) the Court decided the case on the ground that, upon the true construction of the words of the Act, a workman who has not been in the employment of the employer from whom compensation is claimed for a period of at least two weeks is not within the Act; and not merely, as has been contended, on the ground that there is no provision for measuring the compensation to such a workman when the accident has not resulted in his death. It seems to me,

(1) [1900] 1 Q. B. 780.

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therefore, that we must regard all the provisions of the Act on the basis that the case of a workman who has not been in the employment of the employer for a period of at least two weeks is not within the purview of the Act at all. That being so, there is an end of this appeal.

ROMER L.J. I agree. I think that this case is governed by the decision in *Lysons* v. *Andrew Knowles & Sons.* (1)

Appeal dismissed.

Solicitor for appellant: *G. J. Linskey, Liverpool.*

Solicitors for respondents: *William Hurd & Son, for Oliver Jones, Billson & Co., Liverpool.*

E. L.

C. A. 1900 *April* 6.

[IN THE COURT OF APPEAL.]

PEARCE *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Employer and Workman—Railway Company—Accident to Contractor's Workman—Work ancillary to Business of Undertakers—Erection of Station—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

The erection of a railway station is work "which is merely ancillary or incidental to, and is no part of, or process in, the trade or business" of a railway company within the meaning of s. 4 of the Workmen's Compensation Act, 1897; and therefore the railway company are not liable to pay compensation under that Act to the workman of a contractor, who has contracted with them to do such work, in respect of an injury occasioned to the workman in the execution of it.

APPEAL from the decision of the judge of the Southwark County Court on a point of law arising on a claim by the appellant for compensation under the Workmen's Compensation Act, 1897.

The appellant, Pearce, was a painter in the employment of Messrs. Perry & Co., who were builders and contractors, and he claimed compensation from the respondents, the London

(1) [1900] 1 Q. B. 780.

and South Western Railway Company, under the following circumstances. Messrs. Perry & Co. had contracted with the respondents to do such work in the way of altering, repairing, and painting the respondents' stations in the London district as they might be directed to do by the respondents' district engineer at prices fixed by a schedule. They were under this contract making alterations at the respondents' Hampton Court Station, and the appellant was engaged upon the work there when he met with the accident in respect of which he claimed compensation. The county court judge held that the case came within the last portion of s. 4 of the Workmen's Compensation Act, 1897, the work which was being executed by the appellant's employers being work merely ancillary or incidental to and being no part of or process in the business carried on by the respondents, and he therefore decided that the appellant was not entitled to compensation from the respondents. (1)

J. D. Crawford, for the appellant. The respondents are liable to make compensation to the appellant under s. 4 of the Workmen's Compensation Act, 1897. The case falls within the first part of the section and not within the exception created by the last part of it. The work upon which the

(1) The Workmen's Compensation Act, 1897, s. 4, provides that, "Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies. Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively." By s. 7, sub-s. 2, "'Undertakers' in the case of a railway means the railway company."

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appellant's employers were engaged was not merely ancillary to, but formed an essential part of the respondents' business. The definition of a "railway" by s. 7, sub-s. 2, of the Act includes stations. A railway company must have stations to enable it to carry on the business of conveying passengers and goods from place to place, and the erection and maintenance of stations is therefore part of its business. The company is bound to give reasonable facilities for the traffic, and these may involve making structural alterations of a station: see *South Eastern Ry. Co.* v. *Railway Commissioners* (1); *Caterham Ry. Co.* v. *London, Brighton and South Coast Ry. Co.* (2)

J. Lawson Walton, Q.C., and *R. B. D. Acland*, for the respondents, were not called upon.

COLLINS L.J. I am of opinion that the decision of the county court judge was right. I think that it would be difficult to give a better illustration of what constitutes merely ancillary or incidental work as distinguished from the actual business carried on by the undertakers than that which is afforded by the present case. The construction of s. 4 of the Workmen's Compensation Act, 1897, does not, in my opinion, present much difficulty, though there does appear to me to be some difficulty in applying it to the case of a railway company, for it is difficult to see how a railway company could put into the hands of contractors any part of the actual business which they carry on as a railway company, such, for instance, as the driving of their engines; and therefore it is not easy to give any illustration of a railway company's contracting with any one else to do any work not merely ancillary or incidental to the business which they carry on. The primary business of a railway company is to carry passengers and goods. The erection of stations does not appear to me to be any part of, or process in, that business. I am not aware of any legal obligation upon railway companies, apart from any special obligations imposed by particular Acts, to erect railway stations at intermediate places. It is a matter in their discretion. The term "railway" as defined in the Railway and Canal Traffic Act,

(1) (1881) 6 Q. B. D. 586. (2) (1857) 1 C. B. (N.S.) 410.

1854 (17 & 18 Vict. c. 31), s. 1, and the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 3, no doubt includes stations, but they are none the less ancillary to the main purpose of the railway, namely, the carriage of passengers and goods; and though some parts of them may be facilities which the company is bound to provide, other parts of them are not. The work upon which the appellant was engaged, namely, the building of a station, was not in my opinion a part of or process in the business which the company carried on. For these reasons I think that the appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I am of the same opinion. I will accept to the fullest extent the hypothesis put forward by the appellant's counsel, and I will assume for the purposes of this case that, as suggested by him, this station is an essential part of the railway, and also that there was an obligation on the company to construct the station. On that hypothesis it still seems to me clear that the work of constructing it is merely ancillary or incidental to and is not a part of or process in the business which the company carry on within the meaning of s. 4 of the Workmen's Compensation Act, 1897.

ROMER L.J. concurred.

Appeal dismissed.

Solicitors for appellant: *Brooks & Heller.*
Solicitor for respondents: *S. Bircham.*

E. L.

1900
April 2.

BARNETT, Appellant *v.* THE CORPORATION OF ECCLES, Respondents.

Local Government—Practice—Arbitration—Costs—"Full Compensation"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 308.

The "full compensation," to which, by s. 308 of the Public Health Act, 1875, any person who sustains damage by reason of the exercise of the powers of the Act, in relation to any matter as to which he is not himself in default, is entitled, is confined to costs as taxed between party and party, and does not include other expenses reasonably and properly incurred.

The appellant was owner of premises in a borough of which the respondents were the local authority. The respondents served a notice requiring him to abate a nuisance on his premises, and made a complaint to justices, who ordered him to comply with the notice. He appealed to quarter sessions, and the appeal was dismissed, subject to a case for the opinion of the High Court. The High Court ordered that the order of quarter sessions dismissing the appeal be quashed with costs, and that the respondents pay to the appellant his costs of the appeal to the High Court, to be taxed. The costs of the two appeals were taxed, and paid to the appellant. In prosecuting his appeals the appellant reasonably incurred greater expenses than those he received from the respondents. The appellant claimed the difference between the taxed costs of the two appeals and the amount so expended, and he also claimed the costs of defending himself before the justices.

On a special case stated by an arbitrator acting under s. 308:—

Held, that the words "full compensation" were confined to costs which had been taxed and were recoverable as between the parties, and the appellant was not entitled to recover.

Special Case stated by an arbitrator acting under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308. (1)

The following are the facts stated in the case, so far as material for the purpose of this report.

(1) 38 & 39 Vict. c. 55, s. 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of the damage or amount of compensation shall be settled by arbitration in manner provided by this Act. . . . ."

The appellant was the owner of certain cottages in the borough of Eccles.

The respondents, who were the local authority of the borough, caused a notice under s. 94 of the Public Health Act, 1875 (1), to be served upon the appellant, requiring him, within fourteen days, to abate a nuisance existing on his premises, and for that purpose to do certain specified works.

The notice not having been complied with, a complaint was laid by the respondents under s. 95 of the Public Health Act, 1875 (2), charging that the nuisance existed on the premises mentioned in the notice, and that the nuisance was caused by the act, default, or sufferance of the appellant, and that he was the owner of the premises.

The complaint was heard and determined by the justices of the court of summary jurisdiction, who made an order requiring the appellant to comply with all the requisitions of the notice.

The appellant appealed from the order of the justices, which appeal came on at quarter sessions, when that Court dismissed the appeal, subject to the opinion of the Queen's Bench Division of the High Court upon a case stated.

The special case stated was heard before a Divisional Court, who ordered that the order of quarter sessions dismissing the appeal of the appellant against the order of the justices of the borough be quashed, with costs, and judgment entered for the appellant. And it was further ordered by the Divisional Court that the respondents do pay to the appellant his costs of the appeal to the Divisional Court, to be taxed by the master of the Crown Office.

The costs of the appeal to the Divisional Court were taxed at 62*l.* 5*s.* 6*d.*, which was paid to the appellant.

The costs of the appeal to the court of quarter sessions were taxed at 83*l.* 8*s.* 5*d.*, which was paid to the appellant.

In prosecuting his appeals the appellant incurred greater expenses than those he recovered from the respondents.

The appellant's expenses of the appeal to the Divisional

(1) Sect. 94 empowers the local authority to serve notice requiring abatement of a nuisance.

(2) By s. 95, on non-compliance with the notice complaint is to be made to a justice.

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Court were 118*l.* 5*s.* 5*d.*, so that, after receiving the taxed costs, 62*l.* 5*s.* 6*d.*, from the respondents, his pecuniary loss was 55*l.* 19*s.* 11*d.*

The appellant's expenses of the appeal to quarter sessions were 137*l.* 9*s.* 10*d.*, so that, after receiving the taxed costs, 83*l.* 8*s.* 5*d.*, from the respondents, his pecuniary loss was 54*l.* 1*s.* 5*d.*

The appellant's expenses in defending himself before the justices of the borough were 50*l.* 16*s.* 8*d.*, none of which he had recovered from the respondents, so that his pecuniary loss was 50*l.* 16*s.* 8*d.*

The expenses referred to in the last three paragraphs were reasonably and properly incurred by the appellant, in attending before the justices and resisting the order, and in appealing against the order when made. The total pecuniary loss so suffered by the appellant amounted to 160*l.* 18*s.*

Upon the facts hereinbefore set forth the arbitrator held as a matter of law . . . .

(*d*) That the appellant was entitled to "full compensation" under s. 308.

(*e*) That "full compensation" included the pecuniary loss which the appellant suffered in resisting the order of the justices, and in appealing against the order when made.

On this basis the arbitrator awarded the appellant 160*l.* 18*s.* made up as follows:—

(*a*) Pecuniary loss suffered in defending himself before justices, 50*l.* 16*s.* 8*d.*

(*b*) Pecuniary loss suffered on appeal to quarter sessions, 54*l.* 1*s.* 5*d.*

(*c*) Pecuniary loss suffered on appeal to Divisional Court, 55*l.* 19*s.* 11*d.*

If the Court should be of opinion that the arbitrator was right in his findings upon the questions of law, the award was to stand, but if the Court should be of opinion that he was wrong in his findings upon the questions of law mentioned in sub-section (inter alia) (*d*), the award was to be set aside.

If the Court should be of opinion that "full compensation" only included the costs as taxed between party and party, but

that the appellant was entitled to the costs reasonably and properly incurred in defending himself before the justices, the arbitrator awarded in the alternative that there was due from the respondents to the appellant 50*l.* 16*s.* 8*d.*

If the Court should be of opinion that "full compensation" included the pecuniary loss which the appellant suffered in prosecuting his appeals, but did not include the pecuniary loss he suffered in defending himself before the justices, the arbitrator awarded in the alternative that there was due from the respondents to the appellant 110*l.* 1*s.* 4*d.*

Paragraph 32 of the case was in the following words:—

"If the Court should be of opinion that 'full compensation' only includes the costs as taxed between party and party, and does not include the costs incurred by the said William Barnett in defending himself before the said justices, then I award in the alternative that there is nothing due to the said William Barnett from the said local authority."

Danckwerts, Q.C., for the respondents, the corporation of the borough of Eccles. The extra costs incurred by Mr. Barnett, which he now claims to recover against the corporation, are not "damage" which he has sustained within the meaning of the Public Health Act, 1875, s. 308, and, as to the costs of the two appeals, those costs have been taxed, and the matter is res judicata. The costs of appearing before the court of summary jurisdiction cannot be awarded as part of the "full compensation" claimed. Any difficulty that may be suggested as to the jurisdiction of the Divisional Court over the question of costs on the hearing of the appeal from quarter sessions is completely got over by the Supreme Court of Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 2, sub-ss. 2, 3, and the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31. The extra costs of the two appeals, over and above the taxed costs, which have already been paid, are not recoverable as damage sustained, or as a part of the "full compensation" claimed. *In re Bater and Birkenhead Corporation* (1), which was cited and relied upon for the appellant before the arbitrator

(1) [1893] 1 Q. B. 679; affirmed [1893] 2 Q. B. 77.

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is distinguishable, because there the justices had no power to award costs. In *Walshaw* v. *Brighouse Corporation* (1) no costs had been awarded; but, if there had been an order as to costs, followed by taxation, the plaintiff in that case would not have been entitled to recover as damages the excess of the costs as between solicitor and client over the costs taxed as between party and party. "Full compensation" in s. 308 only means the compensation to which the person who sustains damage is by law entitled—that is, costs as between party and party. [He also referred to *Purton* v. *Honnor* (2); *Grace* v. *Morgan* (3); *Malden* v. *Fyson* (4); *Cockburn* v. *Edwards* (5); *Quartz Hill Gold Mining Co.* v. *Eyre* (6); *Pearsall* v. *Brierley Hill Local Board* (7); *Davies* v. *Rhondda Urban Council.* (8)]

Marshall, Q.C. (*Clarke Hall* with him), for the appellant, William Barnett. The words "full compensation" in s. 308 include something more than the costs taxed as between party and party. The rule is correctly laid down in Mayne on Damages, 6th ed. p. 88, as follows: "In the first place, it is a general principle that the right to costs must always be considered as finally settled in the court where the question is adjudicated on, to which that right is accessory; so that, if any costs are awarded, nothing beyond the sum taxed, according to the rules of the Court, can be recovered as damages; or if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other court." No doubt this statement of the law, if it stood alone, might appear to be opposed to the present appellant's claim; but the learned author goes on to point out the exceptions, at page 90: "There seem to be two exceptions to the rule that full costs, as between attorney and client, cannot be allowed as damages. The first is rather an apparent than a real exception. It relates to cases where costs could not be taxed; for instance, where judgment obtained by the defendant had been reversed in error, in which case a court of error could not award costs.

(1) [1899] 2 Q. B. 286.
(2) (1798) 1 B. & P. 205.
(3) (1836) 2 Bing. N. C. 534.
(4) (1847) 11 Q. B. 292.
(5) (1881) 18 Ch. D. 449.
(6) (1883) 11 Q. B. D. 674.
(7) (1883) 11 Q. B. D. 735; affirmed (1884) 9 App. Cas. 595.
(8) (1899) 80 L. T. (N.S.) 696.

And so where judgment had gone by default in the old action of ejectment, when it was not the practice for the officers to tax against the casual ejector. The other exception is where the plaintiff has a right to an indemnity; there it has been laid down by Lord Tenterden, that 'he is not indemnified unless he receives the amount of the costs paid by him to his own attorney.'" (1) The present case comes within both these exceptions. The words "full compensation" mean something in the nature of an indemnity. [He also referred to *Andrews* v. *Barnes* (2); *Slaughter* v. *Mayor of Sunderland* (3); *Cree* v. *St. Pancras Vestry.* (4)]

BIGHAM J. I am of opinion that the respondents are entitled to our judgment on this special case. I think that Mr. Barnett is not entitled to recover more than the taxed costs of the two appeals, and, as these taxed costs had been paid to him before the arbitration proceedings, his claim to the other items referred to in the case must fail. The law does not recognise the difference between the sum which it gives as costs, that is, costs taxed as between party and party, and the larger sum which in practice a litigant has to pay, and which is commonly known as costs as between solicitor and client. The question is, whether in the present case s. 308 of the Public Health Act, 1875, makes a difference, so as to cause the case to be an exception to the general rule of law. I am of opinion that it does not. That section provides that "Where any person sustains any damage by reason of the exercise of any of the powers of this Act, in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers." The question is, What is the meaning of "full compensation" in that section? I am of opinion that it means the compensation which the law gives to the person claiming, and that is costs taxed and recoverable as between party and party. Then the question arises whether the point as to the construction of the

(1) *Smith* v. *Compton*, (1832) 3 B. & Ad. 407; 37 R. R. 387.
(2) (1888) 39 Ch. D. 133.
(3) (1891) 55 J. P. 519.
(4) [1899] 1 Q. B. 693.

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section is affected by authority. We were referred to the case of *In re Bater and Birkenhead Corporation.* (1) That case is distinguishable, because there the party who sustained damage had no right to any costs at all under any order of the justice, and no costs were taxed, but the Divisional Court and the Court of Appeal held that it was reasonable under the circumstances that he should appear, and the expenses to which he was held entitled were recovered, not as costs, but as expenses to which he had been put, and which were recoverable as part of the "full compensation" to which he was held entitled under the Act. This is apparent from the judgment of Charles J. (2) and from that of Lord Esher M.R. (3) That has nothing to do with the question raised in the present case, which is, whether Mr. Barnett had a right to recover, in addition to the taxed costs, which had been awarded by the order of the Divisional Court, and had been paid to him, the other additional expenses which he had incurred. Another case referred to was *Walshaw* v. *Brighouse Corporation.* (4) In that case the judgment of the Court of Appeal proceeded on the ground that there had been no adjudication of petty sessions as to costs, and under those circumstances it was held that the expenses might be awarded, but there is nothing to shew that if the plaintiff had applied to the justices for costs, and had got them, he could afterwards have recovered the difference between the taxed costs and the expenses actually incurred as damages.

The order of the arbitrator must be amended so as to follow the terms of paragraph 32 of the special case, rejecting the other alternative findings.

PHILLIMORE J. I am of the same opinion, and will only add that according to the view which I adopt the expression "full compensation" in s. 308 of the Public Health Act, 1875, does not include the difference between costs as between party and party and costs as between solicitor and client. Our

(1) [1893] 1 Q. B. 679; affirmed [1893] 2 Q. B. 77.
(2) [1893] 1 Q. B. at pp. 684, 685.
(3) [1893] 2 Q. B. at p. 79.
(4) [1899] 2 Q. B. 286.

answer to the question raised in the case will be in the terms of paragraph 32, namely, that the Court is of opinion that "full compensation" only includes the costs as taxed between party and party, and does not include the costs incurred by the appellant in defending himself before the justices, and that there is nothing due to the appellant from the respondents.

Judgment for the respondents.

Solicitors for appellant: *Chester & Co., for Marriott & Co., Manchester.*

Solicitors for respondents: *Ridsdale & Son, for G. W. Bailey, Town Clerk of Eccles.*

P. B. H.

GUARDIANS OF THE CAMBRIDGE UNION, APPELLANTS *v.* GUARDIANS OF THE EDMONTON UNION, RESPONDENTS.

1900
April 9.

Poor Law—Removal of Pauper—Irremovability—Break of Residence—Intention of Pauper to Reside Permanently in Another Union.

A pauper whose original settlement was in the C. Union had by residence become irremovable in the E. Union, and was sent to the E. Workhouse. She desired to be sent to the C. Workhouse, in which her son was, and she therefore obtained her discharge from the E. Workhouse and went to reside for a week with a relative in another union in order to break her status of irremovability in the E. Union. She then returned to the E. Workhouse for the purpose of being sent to the C. Union:—

Held, that an order for her removal from the E. Union to the C. Union was rightly made.

CASE stated by the court of quarter sessions for the county of Middlesex upon the hearing of an appeal against an order made by two justices of the peace for the county, for the removal from the Edmonton Union to the Cambridge Union of Rebecca Watson, aged seventy-two, an inmate of the Edmonton Union Workhouse.

The court of quarter sessions confirmed the order of removal and ordered the appeal to be dismissed with costs subject to this case.

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At the hearing of the appeal it was admitted and agreed to be taken without proof—

1. That at the time the said Rebecca Watson left Cambridge as hereinafter mentioned the place of her last legal settlement was the parish of St. Mary-the-Less in the Cambridge Union, and that the said Rebecca Watson had since acquired no other settlement.

2. That the said Rebecca Watson on December 7, 1891, went from Cambridge to reside with her sister, Mrs. Ingrey, at 29, Milton Road, in the Edmonton Union, where she lived continuously without relief for about one year and nine months up to September 11, 1893, when she went into the Edmonton Workhouse, and that by such residence she had at the time she went into the said workhouse acquired a status of irremovability from the Edmonton Union.

3. That the only question for the quarter sessions to decide was, whether the said Rebecca Watson retained the status of irremovability so acquired by her in the Edmonton Union up to the time of making the order of removal on January 26, 1899.

4. The facts proved by the evidence of the pauper Rebecca Watson and her niece, Mrs. Wayman, were that the pauper's son, John Burwell, had resided with his mother up to the time of her going into the Edmonton Workhouse, and that he went into the Edmonton Workhouse with his mother, he having from his youth upwards been too infirm to gain a livelihood. That John Burwell on September 8, 1898, took his discharge from the said workhouse, and went to reside and resided with his cousin in the parish of West Ham, in the West Ham Union. That John Burwell subsequently returned to the parish of Edmonton and was readmitted into the Edmonton Workhouse. That on or about December 7, 1898, John Burwell was duly removed, pursuant to an order of that date made by two of Her Majesty's justices of the peace, to the Cambridge Union, where his settlement was. That Rebecca Watson took her discharge from the Edmonton Workhouse on Monday, January 9, 1899, as she wanted to be passed on to the union workhouse at Cambridge, where she belonged, the

same as her son had been and where he then was; and went without any warning to the residence of her niece, Mrs. Wayman, in the parish of West Ham, and asked whether she could stay there. That Rebecca Watson stayed with her niece in the West Ham Union until January 16, 1899, when, her niece being unable to keep her any longer, she left with the intention of returning to the Edmonton Union Workhouse, in order to be passed on to the Cambridge Union Workhouse, and went to her sister's house in the parish of Edmonton where she stayed until the following day, when she was readmitted into the Edmonton Workhouse.

5. Rebecca Watson stated in her evidence to the Court that when she left her niece she went to the Edmonton Workhouse in order to be passed on to the Cambridge Union, the same as her son John Burwell had been, in which union he then was.

6. The court of quarter sessions found that when Rebecca Watson left the Edmonton Union on January 9, 1899, she left it with the intention of residing with her son in the Cambridge Union Workhouse and with the intention of not returning to the Edmonton Union to live there; and that when she did subsequently return to the Edmonton Union it was not with the intention of permanently residing within it. Upon these findings the court of quarter sessions held that Rebecca Watson had, when she left the Edmonton Union on January 9, 1899, broken her residence therein and lost the status of irremovability previously acquired by her therefrom, and that she was therefore properly removable from the Edmonton Union to the Cambridge Union when the order of January 29, 1899, was obtained.

R. D. Muir, for the appellants (the guardians of the Cambridge Union). The question is whether the pauper's visit to West Ham constituted a break in her residence within the respondent union. There was no intention to make a new home at West Ham, and a mere intention to break her residence in the respondent union was not sufficient unless she had also the intention to create a new residence at West Ham.

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As Blackburn J. said in *Reg.* v. *St. Ives Union* (1): "The real test is, does the person going out of the parish intend to stay away permanently, or is the absence from the parish merely a temporary absence?" And Quain J. in the same case says (2): "The point is not only whether a person has left one parish, but whether he intended to reside permanently in another." A residence in one parish coupled with an intention to reside permanently in another parish is not sufficient to break the residence. So here the pauper in going to West Ham had no intention of permanently residing there, but desired only to break her residence in the respondent union in order that she might be sent to the workhouse in the appellant union, where she intended to reside permanently.

R. Cunningham Glen, for the respondents (the guardians of the Edmonton Union). It is absolutely immaterial whether the pauper's residence in West Ham was intended to be permanent or not. It is not necessary in order to break a residence that there should be an intention to reside permanently in the parish to which the pauper removes. Any break in the residence which is made intentionally, and with the object of breaking the residence, is sufficient to destroy the status of irremovability. No doubt an intention to reside permanently in the union to which he removes is strong evidence of the pauper's desire to break the status of irremovability, but that is all. The Act (9 & 10 Vict. c. 66) which creates the status of irremovability was passed in favour of the pauper; but if the pauper desires to escape from that status and be sent back to his place of settlement, he may do so by changing his residence whether with the intention of permanently residing in the place to which he goes or not, and there is no evasion of the Act. [He cited *Reg.* v. *Worcester Union* (3); *Newark Union* v. *Glanford Brigg Union.* (4)]

R. D. Muir, replied.

RIDLEY J. In this case we have come to the conclusion that the order should not be interfered with.

(1) (1872) L. R. 7 Q. B. 467, at p. 470.
(2) L. R. 7 Q. B. at p. 471.
(3) (1874) L. R. 9 Q. B. 340.
(4) (1877) 2 Q. B. D. 522.

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The facts are rather peculiar, and do not seem likely to occur again, or to form a precedent for other cases; but I do not think that a pauper who wishes to be removed from the union in which he is situated can be transferred to another simply by stopping a week on the way, and then saying that by so doing there has been a break in the residence which is required in order to give him the status of irremovability.

If that were so, it seems to me that it would be very inconvenient, and I do not find it laid down in any of the authorities, all of which turn upon the question of the period of time necessary to give the status, and whether that period has been broken.

In the case of *Reg.* v. *St. Ives Union* (1) the pauper left the parish with the intention of returning to it. In the case of *Reg.* v. *Glossop Union* (2) there was no intention of returning. In the present case the pauper left with the intention of being sent to the Cambridge Union, and of never returning to Edmonton to reside, but without the intention of residing permanently in the union to which she first went. There is this saving fact which enables us to say that the order is right—that the pauper did in point of fact return to the Edmonton Union for the sole purpose of being passed on to Cambridge, and that I think enables us to affirm this order. I am anxious to do so, because I think it was the pauper's wish to be sent to the Cambridge Union, and I should have thought it a hardship if she had been prevented from being sent to the union where her son was.

DARLING J. I confess that I have less doubt in this case than my learned brother. The facts are that this old woman had a settlement in the Cambridge Union, and she had an invalid son who also had the same settlement. By residing in the union of Edmonton she became irremovable there, and ultimately both she and her son went into the Edmonton Workhouse, and in the end her son was removed to the Cambridge Workhouse as being his place of settlement. His mother, being anxious to join him, got discharged from the Edmonton Workhouse, and went to a relative at West Ham

(1) L. R. 7 Q. B. 467. (2) (1866) L. R. 1 Q. B. 227.

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for a week for the purpose of breaking her irremovability in the Edmonton Union, and then returned to Edmonton Workhouse for the purpose of being sent to join her son in the Cambridge Workhouse.

By virtue of 9 & 10 Vict. c. 66, and the subsequent Acts amending it, she had become irremovable in the parish of Edmonton by having resided there for more than a year. I think that that statute was passed, not to make it more inconvenient for a pauper, but for his benefit, to prevent him from being hustled about from one place to another. I do not think that the statute intended to deprive a pauper of his original settlement if he wished to retain it and took the proper steps to do so.

Now in this case the pauper left the Edmonton Union meaning never to come back as a resident there. That is clear from the case, for it is found that she left the Edmonton Union with the intention of residing with her son in the Cambridge Workhouse—he having no right to be maintained in any other. She left, therefore, with the intention of leaving the union for good, and of getting to Cambridge and staying there. She could not have been removed from Edmonton because she had acquired a status of irremovability, but she was at liberty to go away if she liked. She did not go direct to Cambridge because she was a pauper, and I suppose had not the means, but she went to some friends in another union meaning to return to the Edmonton Workhouse, not in order to stay there, but in order to be sent by the authorities to her original settlement—that is to say, to Cambridge. Accordingly, after a short visit she returned to the Edmonton Workhouse, and she was sent on to Cambridge, and the question we have to decide is whether the order sending her on is right or not. Now, what is the test? In *Reg.* v. *St. Ives Union* (1) Quain J., who does not differ from what the other judges decided, expresses it very clearly. "The point," he says (2), "is not only whether a person has left one parish, but whether he intended to reside permanently in another." Applying that to this case, it is clear that the pauper when she left Edmonton did intend to reside permanently in

(1) L. R. 7 Q. B. 467. (2) L. R. 7 Q. B. at p. 471.

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another — that is to say, in Cambridge. She returned to Edmonton, it is true, but only in order to be sent on to Cambridge, just as she might go to a railway station to take a ticket. I do not think that any of the authorities prevent us from saying that she had broken her status of irremovability in Edmonton, and that the quarter sessions were right in affirming the order sending her back to her original settlement in Cambridge.

Appeal dismissed.

Solicitor for appellants: *Congreve, Cambridge.*
Solicitor for respondent: *F. Shelton, Lower Tottenham.*

A. P. P. K.

ROBERTSON, APPELLANT *v.* HARRIS, RESPONDENT.

1900
April 10.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 25—*Written Warranty—Contract to Supply Milk in Instalments—"Milk to be Pure New Milk"—Whether a Warranty within the Act.*

By s. 25 of the Sale of Food and Drugs Act, 1875, "If the defendant in any prosecution under this Act prove to the satisfaction of the justices . . . . that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor and with a written warranty to that effect," he shall, under certain other specified conditions, be entitled to be discharged from the prosecution.

Upon the hearing of an information against the respondent for having, contrary to the provisions of the Act, sold on December 15, 1899, certain milk to the appellant which was not of the nature, substance, and quality demanded of him by the appellant, the respondent relied on an agreement in writing dated January 20, 1899, by which a farmer agreed to sell to the respondent 1000 gallons of milk weekly, "the milk to be pure new milk":—

Held, that, even if the agreement amounted to a warranty within the meaning of s. 25, there must be some evidence in writing to shew that the particular milk sold to the appellant was purchased with that warranty, and that in the absence of that evidence the agreement afforded no defence to the respondent.

CASE stated by the stipendiary magistrate for the city of Sheffield.

The appellant, who was the medical officer of health for the

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city of Sheffield, laid an information against the respondent for having sold, on December 15, 1899, a certain article of food, to wit, new milk, which was not of the nature, substance, and quality of the article demanded by the purchaser.

At the hearing an agreement in writing dated January 20, 1899, was put in as an answer to the information under s. 25 of the Sale of Food and Drugs Act, 1875 (1), and it was proved that the milk had been purchased as new milk, and that the respondent had no reason to believe at the time when the milk was sold that it was otherwise, and that it was sold in the same state as when it was purchased.

The agreement was in the following terms:—

"20th Jan. 1899. Hall Farm, Duffield.

"I, Sarah Sheldon, of the above address, agree to sell to William Harris, of 682, Attercliffe Road, Sheffield, 1000 gallons of milk weekly in such quantities as arranged, the milk to be pure new milk delivered at Attercliffe, Masboro' and Swinton stations on the Midland Railway, carriage paid, at 7½*d.* per imperial gallon from January 21 to March 31, 1899, both inclusive; 7¼*d.* per imperial gallon from April 1 to September 30, 1899, both inclusive, and 7½*d.* per imperial gallon from October 1, 1899, to January 20, 1900, both inclusive.

"(Signed) Sarah Sheldon."

The magistrate was of opinion that this agreement contained a written warranty within the meaning of s. 25 that the milk should be new milk, and he accordingly discharged the respondent from the prosecution; but, at the request of the appellant, he stated this case for the opinion of the Court.

Reginald Brown, Q.C., for the appellant. There ought to have been a conviction. The agreement in question does not

(1) By the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25, "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution . . . ."

contain a sufficient warranty to satisfy the requirements of the section. There must either be a separate warranty in writing with each delivery, or there must be something to ear-mark each delivery as part of the original purchase, and as included, therefore, in the general warranty. There is no case where, as here, the consignment was delivered without any warranty in writing, or any document or label attached to it and referring to the written warranty. [He cited *Rook* v. *Hopley* (1); *Harris* v. *May* (2); *Farmers' and Cleveland Dairy Co.* v. *Stevenson* (3); *Hotchin* v. *Hindmarsh* (4); *Laidlaw* v. *Wilson* (5); *Lindsay* v. *Rook* (6); *Jiorns* v. *Van Tromp* (7); *Elder* v. *Smithson* (8); *Hawkins* v. *Williams.* (9)]

Frankau, for the respondent. The magistrate must be taken to have found as a fact that this was a delivery under the contract, and that contract does contain a written warranty. A warranty is a collateral undertaking forming part of the contract: Benjamin on Sales, 3rd ed. p. 605. In *Harris* v. *May* (2) it was a sale by description, and there was no warranty. It is the warranty contained in the contract that must be looked at. As Charles J. said in *Laidlaw* v. *Wilson* (10): "It is in the contract, and in the contract alone, that the warranty which the statute requires must be sought."

RIDLEY J. I think that our judgment should be for the appellant. The question is whether there was put forward on behalf of the defendant a written warranty sufficient to satisfy the 25th section of the Sale of Food and Drugs Act, 1875, which provides: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when

(1) (1878) 3 Ex. D. 209.
(2) (1883) 12 Q. B. D. 97.
(3) (1890) 60 L. J. (M.C.) 70.
(4) [1891] 2 Q. B. 181.
(5) [1894] 1 Q. B. 74.
(6) (1894) 63 L. J. (M.C.) 231.
(7) (1895) 64 L. J. (M.C.) 171.
(8) (1893) 57 J. P. 809.
(9) (1895) 59 J. P. 533.
(10) [1894] 1 Q. B. 74, at p. 78.

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he purchased it, he shall be discharged from the prosecution." Now he has satisfied the statute in this respect, that it is found as a fact by the magistrate that he had no reason to believe at the time when he sold it that the article was otherwise; but the question is whether he has shewn that he purchased it with a written warranty to the effect that it was the same in nature, substance, and quality as that demanded of him by the prosecutor. I do not think that he has. He has produced a written agreement under which he agreed to buy 1000 gallons of milk to be sold in certain quantities weekly, the milk to be pure new milk, delivered over a certain period of time. That is a written warranty. I adopt for that purpose the reasoning of Charles J. in *Laidlaw* v. *Wilson* (1), where he says (2): "To my mind it is enough if the language of the document imports a warranty and shews an intention on the part of the vendor to warrant." The word "warrant" is not to be found in this agreement for the supply of the milk, but the document does contain language which imports a warranty, and shews an intention on the part of the vendor to warrant. So far the respondent is right. There is a written document containing a warranty to that effect. But the statute does not say merely that; it says he must shew that he purchased it with a written warranty to that effect, and after *Harris* v. *May* (3), supported as it is, although distinguished, by *Laidlaw* v. *Wilson* (1), it appears to me that it is not sufficient merely to shew that a general agreement has been arrived at, unless it can be shewn further that the particular article in question has been bought with and in reference to such an agreement. For that purpose some further evidence is necessary. There was no such evidence here as in the case of *Harris* v. *May* (3), which otherwise was very like this case, for although the contract in that case did not contain the words "to be pure new milk," but simply the description, so many gallons "of new and pure milk," I think it is clear that the Court in that case found that the words in the contract itself did amount to a warranty. Lord Coleridge C.J. says (4): "It is true that an action for breach of

(1) [1894] 1 Q. B. 74.
(2) [1894] 1 Q. B. at p. 77.
(3) 12 Q. B. D. 97.
(4) 12 Q. B. D. at p. 99.

warranty could be brought upon that contract," and Charles J. in the subsequent case of *Laidlaw* v. *Wilson* (1) shews clearly what he understood was intended by Lord Coleridge C.J. in *Harris* v. *May* (2), for he says (3): "But, on looking at his judgment as a whole, I think that what he really meant was that it was not such a warranty as would cover the specific delivery of milk on April 12, in the absence of some written evidence that that specific delivery was made under the contract." That is to say, there was a warranty in the general agreement to deliver the milk, but there must be something more. It must be shewn that the purchase of the particular article was made with that warranty. There ought to be something written to shew that the warranty in the general agreement is extended to and includes the specific article. I can imagine that if this point had been free from decision it would have been very capable of argument, but it is certainly too late for us, even if we felt any doubt in the matter, to take the opposite view. There must, therefore, be some written evidence in a case like the present to shew that that particular article was bought under and with the warranty contained in the general contract. In the case of *Laidlaw* v. *Wilson* (1) there was some written evidence to shew that the specific delivery was made under the contract, thus connecting the warranty with the article which was the subject of the purchase. If there had been anything written in this case to shew that the warranty contained in the general agreement for the delivery of the milk extended and related to the article in question, then there would have been enough to satisfy the statute. In the absence of that evidence, it appears to me that the magistrate came to the wrong conclusion when he said that the defendant who was charged with the offence under this statute had brought himself under the provisions of s. 25.

For these reasons it seems to me that the conclusion arrived at was not a correct one, and that the case should be sent back with a direction that the defendant ought to be convicted.

(1) [1894] 1 Q. B. 74. (2) 12 Q. B. D. 97.
(3) [1894] 1 Q. B. 74, at p. 78.

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DARLING J. This case raises questions of some difficulty, and I do not think, speaking for myself, that all the cases on the subject are entirely to be reconciled; in fact, I find it difficult to come to the conclusion that there is not a difference of opinion between the judges who decided *Laidlaw* v. *Wilson* (1) and the judgments in the case of *Harris* v. *May*. (2) What happened here was this: A retailer sold milk which was not pure milk, and he was summoned for that. He sought to shew that he was excused by virtue of s. 25 of the Sale of Food and Drugs Act, 1875. [The learned judge read the section, and continued:—]

Now, here, what he had done was that, long before the sale of this particular milk, he had entered into a contract for the supply of milk for a considerable period in the following terms: "I, Sarah Sheldon, agree to sell to William Harris 1000 gallons of milk weekly in such quantities as arranged, the milk to be pure new milk." He had entered into a contract to buy in future 1000 gallons of milk a week, the milk to be pure new milk. The milk to be supplied was to be pure milk, but there is no statement that the particular consignments were pure milk. The milk did not exist at the time the contract was made. To my mind this statute has to be construed strictly, and I have very great doubt whether a contract which says what is to be the state of things in future can be a written warranty within the meaning of s. 25 of the Food and Drugs Act, 1875. Whenever that question is distinctly raised, I think it will be interesting to have it decided. It might have been raised in *Harris* v. *May* (2), but there counsel on one side only was called upon, and the question was not raised. In Blackstone's Commentaries the law is thus laid down (3): "Also if he, that selleth anything, doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer; else it is an injury to good faith, for which an action on the case will lie to recover damages. The warranty must be *upon the sale*, for if

(1) [1894] 1 Q. B. 74.
(2) 12 Q. B. D. 97.
(3) Blackstone's Commentaries on the Laws of England, vol. iii. p. 165, 1st ed. (1768).

it be made *after* and not *at* the time of the sale it is a void warranty: for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also the warranty can only reach to things in being at the time of the warranty made, and not to things in futuro; as that a horse is sound at the buying of him; not that he will be sound two years hence." That passage was cited to Lord Mansfield in the case of *Eden* v. *Parkison* (1), and Lord Mansfield in giving judgment said (2): "Many points have been gone into on both sides, which are not necessary for the decision of this case. For instance there is no doubt but you may warrant a future event." It is clear from Lord Mansfield's own statement that that remark was not necessary for the decision of the case, and that his own observation, therefore, is only an obiter dictum; but at all events, even if it is good law that you may warrant a future event, I do not think it is at all clear that this statute, which Lord Coleridge has said in *Harris* v. *May* (3) is to be strictly construed for the benefit of the health of the people, did not mean a warranty in the strict sense in which warranty of goods was used by Blackstone—a warranty that a thing in being was of a certain quality. I do not affect to decide that it is so; I only say that it seems to me there is the gravest reason to suppose that that is what the statute means, and if it were necessary to decide it I might very possibly decide it in that sense. Before I leave this point I should like to call attention to the case of *Beattie* v. *Lord Ebury*. (4) Mellish L.J. there says (5): "There is a clear difference between a representation that something exists at that moment that does not exist, and a representation that something will be done in the future. Of course a representation that something will be done in the future cannot either be true or false at the moment it is made. In point of fact, although you may call it a representation, if it is anything it is a contract or promise." Now here, as Mellish L.J. says, this contract that the milk shall be pure may be called a

(1) (1781) 2 Doug. 732 a.
(2) 2 Doug. at p. 735.
(3) 12 Q. B. D. 97.
(4) (1872) 41 L. J. (Ch.) 804.
(5) 41 L. J. (Ch.) at p. 808.

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representation in one sense, but if it is anything it is a contract or a promise, and I should have great hesitation in holding, if it were absolutely necessary to the decision of this case, that this contract was a warranty at all within the meaning of s. 25 of the Food and Drugs Act, 1875.

I have felt it necessary to say this, but I do not feel it necessary to give any definite opinion upon it. It would not be an obiter dictum, because I might decide the case on that ground and that ground alone; yet I do not think it necessary to do so, because I agree with the judgment given by my brother Ridley, that this decision must be reversed on the other ground which he has mentioned.

Appeal allowed.

Solicitors for appellant: *Richard Smith & Sons, for H. Sayer, Sheffield.*

Solicitors for respondent: *Geare & Pease, for Fairburn, Sheffield.*

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April 10.

WRIGHT & SON *v.* BULL.

County Court—Costs—Remitted Action—Judgment under Order XIV. for Part of Claim—Judgment for Defendant in County Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 113.

In an action brought in the High Court to recover 20*l.* 2*s.* as the price of goods sold and delivered, an order was made under Order XIV. by which leave was given to the plaintiffs to sign judgment for 8*l.* 14*s.* if that amount was not paid within seven days, and leave was given to the defendant to defend as to the residue of the claim, and it was ordered, under s. 65 of the County Courts Act, 1888, that the action should be tried in the county court. The defendant paid the sum of 8*l.* 14*s.* under the order, and at the trial in the county court judgment was given for him, no order being made as to costs:—

Held, that, the plaintiffs having succeeded in the action in recovering the sum of 8*l.* 14*s.*, the defendant was not entitled to costs, although he had obtained judgment in the county court.

APPEAL from the decision of the Swansea County Court.

An action was brought in the Derby District Registry of the High Court of Justice on April 10, 1899, for 20*l.* 2*s.* for goods

sold and delivered. Before action 8*l.* 14*s.* was tendered by the defendant to the plaintiffs in payment of the debt, but was refused by the plaintiffs.

On May 4, 1899, on an application under Order XIV. for judgment, the master made an order for the payment by the defendant of 8*l.* 14*s.* within seven days, and gave leave to defend as to the residue, and remitted the action to the Swansea County Court for trial. The 8*l.* 14*s.* was paid under the order, and the trial of the remitted action was decided in favour of the defendant, for whom judgment was given. No order was made as to costs, and they were left to abide the event. A question having arisen as to what these costs should be, the matter was argued before the registrar of the county court, who decided that the defendant was not entitled to costs because the plaintiffs had recovered the sum of 8*l.* 14*s.* in the action. It was admitted that, under s. 116 of the County Courts Act, 1888, the plaintiffs, having recovered less than 20*l.* in a High Court action, were not entitled to costs. The registrar, therefore, decided that there were no costs on either side, and his decision was upheld by the judge. The defendant appealed.

Newbolt (*Willes Chitty* with him), for the defendant. By s. 113 of the County Courts Act, 1888, costs shall abide the event in default of any special direction. The event in this case was judgment for the defendant, who is therefore entitled to his costs. The plaintiffs have not recovered anything, for the 8*l.* 14*s.* was tendered to them and refused before action brought. Sect. 65 of the County Courts Act, 1888, provides that the costs of proceedings subsequent to the order remitting the action shall be allowed according to the county court scale, and the costs of the order and of all proceedings previously thereto shall be allowed according to the High Court scale, and therefore the defendant, having got judgment in the county court, is entitled, in the absence of any special direction, to his costs on the county court scale.

Etherington Smith, for the plaintiffs. No tender was pleaded, and that point cannot now be taken. A plea of tender is a plea

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in bar which, if it is successful, is an absolute defence to the action, and there is no such plea on the record in this case. The only question argued before the registrar was whether the action could be divided into proceedings in the High Court and proceedings in the county court. That point was decided in *White* v. *Headland's Patent Electric Storage Battery Co.* (1), where it was held that an action remitted from the High Court to the county court is one action, and cannot be regarded as having been split into two by the order remitting it. Treating this as one action, the plaintiff has recovered 8*l.* 14*s.* in it, and although he is unable to get any costs since he has recovered in the High Court a sum less than 20*l.*, still he is a successful plaintiff in the action, and the defendant, having failed, is not entitled to costs. No order to pay costs can be made against the party who is successful in the action. Sect. 65 of the County Courts Act, 1888, only deals with the scale on which costs have to be paid, and does not affect the general right to costs.

Newbolt replied.

RIDLEY J. In this case it seems to me that in strict justice the defendant ought to have his costs so far as the action and proceedings took place in the county court. To hold otherwise certainly seems unjust. The plaintiffs claim 20*l.* 2*s.*; the defendant says that 8*l.* 14*s.* is all that he owes, and sends the plaintiffs a cheque for that amount, which they return. Then an action is brought, and on proceedings being taken under Order XIV. the plaintiffs have leave to sign judgment for 8*l.* 14*s.*, and the defendant has leave to defend as to the balance, and the action is remitted to the county court. In the county court the defendant successfully resists the plaintiffs' claim and gets judgment. Certainly it would seem that although the plaintiffs have recovered 8*l.* 14*s.* in the action, a sum which the defendant was always ready and willing to pay, the defendant, who has successfully resisted in the county court the plaintiffs' claim for the larger amount, ought to be entitled to costs. The plaintiffs take up the position of refusing to receive what is

(1) [1899] 1 Q. B. 507.

really owing to them, and proceed to worry the defendant with an action at his expense and in perfect safety to themselves. Still, *White* v. *Headland's Patent Electric Storage Battery Co.* (1) is no doubt rightly decided, and it is binding upon us. It decides that an action remitted to the county court is one action and cannot be split in two by the order of remittal. If, therefore, this is one action in which the plaintiffs have recovered the sum of 8*l.* 14*s.*, it cannot be said that the defendant has succeeded in the action. Then the question arises, Has the county court judge the same power over the costs that a judge of the High Court would have? Can he say that the costs down to the recovery of the 8*l.* 14*s.* must be paid by the defendant, but the rest of the costs must be borne by the plaintiffs? I do not think he has such power, although I should be much inclined to say that he ought to exercise such a discretion if he possessed it. But the discretion of the judge is, by s. 113 of the County Courts Act, 1888, limited to costs "not herein otherwise provided for," and that I think narrows the power of the county court judge to deal with the costs to such matters as are not dealt with by the general scheme of the Act. The section seems to me to have been put in with a view to include such costs as were not dealt with by the general enactment as to costs, but in the absence of any special direction it was provided that costs should abide the event. Here "the event" is clearly the recovery of the 8*l.* 14*s.*, and as there was no special direction I think that the costs must abide that event—that is to say, that the defendant does not get any costs. It is admitted that the plaintiffs, having recovered only 8*l.* 14*s.* in the High Court, are not entitled to any. I regret this decision because it seems to me to be a very hard case.

DARLING J. I am of the same opinion. This action, which was commenced in the High Court and was remitted to the county court, was one action from the first. In that action the plaintiffs have recovered the sum of 8*l.* 14*s.*, because that amount has been paid to them under the order remitting the action to the county court and before the hearing in the county

(1) [1899] 1 Q. B. 507.

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court took place. It was nevertheless paid in the action, and was recovered by the plaintiffs in the action, and they would therefore be entitled to their costs as the successful plaintiffs in the action were it not for s. 116 of the County Courts Act, 1888. The plaintiffs have no doubt gone on with their action in the county court and have failed to substantiate their claim for the larger amount, but they have recovered 8*l.* 14*s.* in the action, and the defendant, although he has succeeded in rebutting the claim for the larger amount, is not the successful party in the action. It seems to me abundantly clear from the judgment of Collins L.J. in *White* v. *Headland's Patent Electric Storage Battery Co.* (1) that the total amount recovered is what must be looked at. "I think," he says (2), "that, however minute the portion of the claim which is recovered in the county court may be, the scale applicable must depend upon the total amount recovered." That is to say, that if a farthing was recovered in the county court, that farthing must be added to the amount recovered under Order XIV., and the total amount must be treated as if it had all been recovered in the county court. The plaintiffs here do not get their costs for the reason that I have pointed out, but the defendant, having failed in the action treated as a whole, cannot have his costs. I think, therefore, that the decision of the county court judge was right and that it must be upheld.

I agree with my learned brother that the Act does seem to operate harshly in this case and to work something that looks very like injustice.

Appeal dismissed. Leave to appeal refused.

Solicitors for plaintiffs: *A. F. & R. W. Tweedie, for W. S. Fisher, Wirksworth.*

Solicitors for defendant: *Riddell & Co., for Viner, Leeder & Morris, Swansea.*

(1) [1899] 1 Q. B. 507. (2) [1899] 1 Q. B. at p. 513.

A. P. P. K.

IRVING *v.* TURNBULL AND ANOTHER.

1899
Dec. 19.

Party Wall—Adjoining Owners—Implied Contract to Pay Half Cost of Party Wall.

A building society, who were the mortgagees of a building estate, joined with the mortgagor in selling a site on the estate to a purchaser; the conveyance contained a covenant by the purchaser to perform the building and other conditions in the schedule, one of which was that the purchaser first building a party wall should be repaid half the value by the purchaser of the adjoining site. The purchaser, having built a house on the site, mortgaged it to the building society, who subsequently under their power of sale sold it to the plaintiff. At a later date the building society, in exercise of their power of sale under the original mortgage of the building estate, sold the residue of the estate to a company, who in their turn sold to the defendants a site adjoining the plaintiff's house, the agreement of sale containing a similar (though not verbally identical) condition as to party walls to that above mentioned. The defendants built a house on their site, making use for that purpose of the plaintiff's party wall, half of which (as provided by the building conditions) was built on the plaintiff's, and half on the defendants', land:—

Held, that the circumstances raised an implied contract on the part of the defendants to pay half the cost of the party wall to the plaintiff as the owner of the adjoining house, notwithstanding that the wall had in fact been built by the plaintiff's predecessor in title.

APPEAL of the defendants from a decision of the judge of the county court of Newcastle-upon-Tyne.

The plaintiff in his particulars of demand claimed damages for trespass by the defendants in building on and against the plaintiff's gable walls and making use of the same without his consent, and an injunction to restrain the defendants from so doing; or in the alternative for payment of 25*l.*, the half cost of the said gable walls. Substantially the question in dispute was whether the plaintiff was entitled to be paid the 25*l.* by the defendants. The facts were shortly as follows:—

On May 5, 1876, one J. C. Atkinson, who was the owner in fee simple of a building estate at Newcastle, mortgaged the estate to the Newcastle-upon-Tyne Permanent Building Society; the mortgage deed contained a power of sale in certain events,

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which afterwards happened. Subsequently Atkinson sold two of the building sites comprised in the mortgage to one Pyle, a builder, and on December 27, 1876, a conveyance of the two sites was duly executed, the building society joining in the conveyance for the purpose of releasing the two sites in question from the mortgage. This conveyance contained a covenant by the purchaser (Pyle) to perform the building and other conditions contained in the schedule; one of those conditions was in the following terms: "Party Gables, &c. The division gables and walls between adjoining houses and yards to be of stone 16 inches thick or of brick 9 inches thick, with projecting chimney breasts upon proper foundations and 9-inch brick backs to fireplaces. The yard walls to be 8 feet high above the street. These gables and walls and the divisions between the gardens to be party walls, the middle of which shall be the boundary between the sites, except where the back or end wall of one house may form the boundary of the adjoining yard or garden, in which case the outer face of the house wall shall be the boundary, and the owner of the yard or garden shall pay half of the value of an ordinary wall and be entitled to use it as a party wall to the height of 8 feet. The purchaser first building a party wall to be repaid by the purchaser of the adjoining site one half the current value of such party wall, the same to be determined in case of dispute by the vendor's architects, whose decision shall be final."

Pyle built two houses upon the sites conveyed to him, one of which was numbered 4, Wolsingham Road, and on June 30, 1877, Pyle mortgaged these two houses to the same building society, the mortgage containing the usual power of sale. On February 1, 1892, the building society, in exercise of their power of sale under this mortgage, sold the house No. 4, Wolsingham Road, to the plaintiff. Subsequently the building society, in exercise of their power of sale contained in the mortgage of May 5, 1876, sold the residue of Atkinson's estate to the Ashburton Estate Company, Limited, who on March 20, 1899, entered into an agreement to sell to the defendants, a firm of builders, the site adjoining the plaintiff's house, No. 4, Wolsingham Road. This agreement contained the following

condition: "All gables, except in the case of end houses, and all division yard walls and garden fences shall be party walls and fences, and the entirety thereof shall always be maintained as division walls and fences, and shall be erected as to one half of the thickness thereof on the site now being purchased, and as to the other half on the adjoining ground, and where another purchaser shall have built or made any gable or any division wall or fence adjoining the site now being purchased, the present purchaser shall pay to the former purchaser one half of the cost of the wall and fence so built or made." The defendants built a house on the site bought by them, and in doing so used the gable of the plaintiff's house, half of which gable was built on the plaintiff's land and half on the defendants', and the substantial question in the action was whether the plaintiff was entitled to be paid the half of the cost of the gable by the defendants. At the trial the defendants set up a custom in Newcastle by which the original builder of a house with a party wall was entitled to be paid half its value from the purchaser of the adjoining house, although the builder had in the meantime sold his house; but this defence, so far as it rested upon the alleged custom, was abandoned. The learned county court judge was of opinion that the right to recover payment for the half of the gable or wall passed with the house first built, and gave judgment for the plaintiff. The defendants appealed.

Robson, Q.C., for the appellants. It is admitted that the defendants must pay some one, but the right to payment for half of the party wall did not pass with the land under the conveyance to the plaintiff, and the defendants are liable to pay the original builder. The plaintiff's conveyance contained no assignment of the builder's right to payment in respect of the party wall, and only by a specific assignment could such a right as is claimed pass to the purchaser of a house. The obligation under the covenant in the conveyance to pay this money was a personal covenant only, and no personal covenant for payment of money runs with the land. Further, the right to receive this money did not pass from the building society to

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the plaintiff under the general words "all the estate, right, title, interest, claim and demand" in the conveyance.

Lawson Walton, Q.C. (*Stewart-Smith* with him), for the respondent. The plaintiff's claim is one to enforce the payment of money due under an implied agreement to pay. The defendants have availed themselves of the accommodation of the plaintiff's wall, and the law implies an obligation to pay for such user. The plaintiff, and not his predecessor in title, is the person entitled to the benefit of the implied contract, for, where a person uses the property of another under circumstances from which the law will imply an obligation to pay for the user, the obligation is to pay the person whose property he is using. Having failed at the trial to prove a custom to pay the builder, the obligation on the defendants is to pay the adjoining owner. The case of *Christie* v. *Mitchison* (1) is an express authority for the principle that if a man takes property which he is under an obligation to pay for, and does not know whom he is to pay, the law implies an obligation on his part to pay the owner. Here the defendants used the wall under an express obligation to pay for the user, and they must pay the plaintiff, who is the owner of the wall of which they have availed themselves.

Robson, Q.C., in reply. In *Christie* v. *Mitchison* (1) there was an express promise to pay; that case is therefore not in point. The person to be paid is the original builder, who built half the wall on the defendants' land, and therefore could not sell that half to the plaintiff; that half was really built for the defendants, who acquired the property in half the wall when they subsequently bought their site. There was no privity of contract between the plaintiff and the defendants. An implied agreement can only be set up where it is necessary in order to carry out the clear intention of the parties, and there can be no implied agreement in the present case unless the plaintiff can shew that the wall was his own property.

DARLING J. This case raises points of some difficulty, and I am not sure that they will be entirely disposed of by the

(1) (1877) 36 L. T. 621.

judgment which I am about to pronounce. It appears that there was a building estate which was being developed, and various purchasers entered into contracts as they bought different plots of land from the common vendor, all of the contracts apparently including certain conditions with which I will presently deal. A man named Pyle bought one plot, and mortgaged it to a building society, who sold it to the plaintiff, the adjoining plot also falling into the hands of the building society, who sold it to the defendants. A house had been built on the first of these two plots with a party wall, half of which extended over the plot of land ultimately sold to the defendants, and the defendants admit that they must pay some one for the convenience which they derive from that party wall when building a house on their plot of land and making use of that party wall for the purpose. The question is, whom are they to pay for that convenience? The plaintiff contends that, as the owner of the adjoining plot and the joint owner of the party wall, he is entitled to be paid this money by the defendants; the defendants, on the other hand, contend that the proper person to pay is the builder who built the house which now belongs to the plaintiff.

I now come to the clause in the agreement, which became mutually binding on the plaintiff and defendants by reason of the manner in which the estate was dealt with; that clause says: "All gables, except in the case of end houses, and all division yard walls and garden fences shall be party walls and fences, and the entirety thereof shall always be maintained as division walls and fences, and shall be erected as to one half of the thickness thereof on the site now being purchased, and as to the other half on the adjoining ground, and where another purchaser shall have built or made any gable or any division wall or fence adjoining the site now being purchased, the present purchaser shall pay to the former purchaser one half the cost of the wall and fence so built or made."

It is contended by the plaintiff that, when the defendants had built up against the party wall which was already erected, there arose an implied contract to pay for that convenience; and I think that that contention is correct, if there is no provision

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that they shall pay some particular person for it; but then arises the question, whom are they to pay? I think that the proper way of dealing with this case is to hold that there is an implied agreement to pay according to the terms of the clause which I have just read, so far as they can be applied to the state of circumstances which has arisen; the clause provides that "where another purchaser shall have built . . . . the present purchaser shall pay to the former purchaser," &c. I should understand that "the present purchaser" in the present case means the defendants. I think that the scheme contemplated that a man would buy a plot of land, such as the plaintiff has got, and would build a house upon it; and thereupon the present purchaser, the defendants, would become liable to pay the other purchaser who had built the party wall for the convenience of building up against it—in fact, for half the party wall. In the present case we have not exactly "another purchaser who shall have built," because the plaintiff's site was built upon by a builder who, having built the house, sold the house with the plot of ground on which it stood; but I think that the person who bought from the builder, that is the plaintiff, is exactly in the position of the person who is called "another purchaser who shall have built" in this clause. I think that there is an implied contract on the part of the defendants that they will pay, not the builder, who sold and parted with the house, but the plaintiff to whom he sold it; just as though the plaintiff had bought the plot of ground first, and then had proceeded to build the house upon it. For these reasons I think, although with no great confidence, that the county court judge's decision was right, although not for the same reasons which actuated the learned judge.

CHANNELL J. I also am of opinion that the view of the learned county court judge is right. The case presents some difficulty, and it is one that we must deal with, so far as is possible, upon principle. I understand the facts to be these: there is a common vendor, who is about to sell plots of land, and who makes the provision as to party walls in the contracts,

which my brother Darling has read. Leaving out any question of sub-purchasers, how does such a clause operate? The vendor sells to the first purchaser upon these conditions; what is it that he sells to him? The freehold of a defined plot of land with a defined boundary, and also a licence to build his party wall over the boundary, half of it on the adjoining land. The vendor says to that first purchaser, "Not only you may, but you shall, build your wall in that position"; and he might of course have said, "And inasmuch as the half wall built upon my property" (because it would still remain his property, the adjoining plot being unsold) "will be of use to me, I will pay you for it." But as he does not care to part with his money till he has found a purchaser for the other plot, he makes a different bargain, and says, "I will not pay you for it, but will make terms with the purchaser that when I sell the adjoining plot he shall pay you for it." That is the bargain between these two parties.

Then when the other plot is sold there is another bargain, on similar terms of course, but with a corresponding variation, between the vendor and the second purchaser. So far the two purchasers have no privity of contract between each other, and, treating the matter as at common law, there could of course be no action between them. In equity I believe that, inasmuch as they would have taken with notice of these provisions, so far as the provisions were restrictive provisions each party would have taken subject to them, and the provisions might have been enforced between them. But there is a difficulty in resting this case upon that doctrine of equity, for I believe it is clearly settled that that doctrine does not apply to affirmative provisions, and does not make a man liable to pay money out of his own pocket because he has accepted a property knowing that somebody else is expecting him to pay that money; so that that principle of equity does not affect this case, and the rights of the parties must be decided on some other and different principle. Passing that by, how does the matter stand, and how, at common law, could privity of contract have been created between the parties?

It seems to me, as I suggested during the argument, analogous

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to the familiar case of an outgoing and incoming tenant, each of whom makes his contract with his landlord as to a valuation, where of course the privity of contract of each is with the landlord, and as between themselves there is no privity of contract in the first instance. But it has always been held that very little will create that privity of contract where it is so convenient for all parties that the matter should be carried out between the two parties really interested in it; very little will constitute a privity of contract sufficient to enable the one to sue the other in respect of that contract which has been made in that roundabout fashion. In a case like the present it seems to me that sufficient has taken place to constitute privity of contract where the second purchaser in fact uses the wall that has already been built by his neighbour; consequently, at that stage I think there is sufficient for us to hold that an action at common law as upon an implied contract would arise from such a use of the wall. It is at that stage that the implied contract would for the first time arise; it would not arise upon the second purchaser making his contract of purchase nor before the user. That is the proposition put forward on behalf of the plaintiff, and I think it is well founded.

I have been dealing with the case quite apart from any transfer by the first purchaser who built the wall to a sub-purchaser; let us now see how that affects the question. Supposing that the purchaser who has built his wall and the sub-purchaser consider the matter and they make an express bargain about it, the purchaser would say to the sub-purchaser, "Now I have built a wall partly on land which I am conveying to you, partly on the neighbouring land; I have had a licence to build it on the neighbouring land, and you will have that licence too. Until there is a building built on the adjoining land that wall will for all practical purposes be yours; the freehold on which it stands will not be yours, but for all practical purposes it will be yours as the wall of your house, and when another man comes upon the adjoining plot and uses this wall, he will have to pay somebody for it. What shall we say? Shall I keep it till that party comes, or will you?" Then the sub-purchaser would say, "I shall be there, and I

shall know when the man next door is building, and I shall be able to get the money. You may be gone to Australia, or, if you are dead, your executors may not know anything about it. It would be far more convenient that the right should go with the wall." Now, suppose they make an express agreement that the right shall go to the sub-purchaser; at that moment the adjoining property has not been built upon, and the circumstances have not arisen which make the implied contract in law; but if subsequently to that express contract between the first purchaser and the sub-purchaser a person builds upon the adjoining plot, and thereby makes, as I have already said I think he does, an implied contract with some one, with whom does he make that implied contract? Surely with the man who is in actual possession of the property, who has the present benefit of the licence to have a building upon the adjoining property, and who has in fact, in the case I have been putting, between himself and the purchaser acquired it by contract between them. Nobody can doubt when that has taken place that the contract that is in fact made for the use of the wall is made with the person who is there in possession. If that is so, this case must be decided in favour of the present plaintiff, provided that the true interpretation of the contract between him and the person from whom he bought is that which I have been supposing to have taken place by express contract between them. That brings us round merely to the question of how to construe the contract between the first purchaser of this plot and the sub-purchaser who buys the plot from him with the house built upon it. Are we to consider that that contract upon its true interpretation passes the right to be paid eventually for the half wall when it is built? Now, that is a question that might be provided for by express words; but one is not surprised to find that it is not. The plaintiff's counsel suggests that there is sufficient in the language used to pass the right. I am not quite sure that I can find that; but I do think that the principle which I suggested to the defendants' counsel in the course of his reply is entirely applicable. The licence for this wall passes: that is agreed; surely it must be inferred that the right to be paid for it passes too. It is

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something that is said to be valuable; it may be of value, but it is impossible to conceive that a person would intentionally reserve such a right to himself; on the contrary, I think, we must hold that even without express words it did pass, and, if it did pass, the implied contract arose afterwards, and the parties to it would be the same as if it had passed by express contract. On those grounds I agree that the decision must be upheld, although there are some points as to which doubts may be entertained; but on the whole I am satisfied that the learned county court judge was right.

Appeal dismissed. Leave to appeal. (1)

Solicitors for appellants: *Richard Smith & Sons, for S. G. Ward, Newcastle-upon-Tyne.*

Solicitors for respondent: *J. E. & H. Scott, for Hodge & Robson, Newcastle-upon-Tyne.*

W. J. B.

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March 15

In re WARREN. *Ex parte* TRUSTEE.

Bankruptcy—Fraudulent Preference—Payment of Creditor with a view to Prefer Surety—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

In order to constitute a fraudulent preference within the meaning of s. 48 of the Bankruptcy Act, 1883, a payment made by a debtor to one of his creditors must be made to the creditor intended to be preferred. Where, therefore, an insolvent debtor, who is jointly and severally liable with two sureties upon a promissory note, pays the amount of the note to the payee with the view of preferring the sureties by releasing them from their contingent liability upon the note, the payment is not a fraudulent preference within that section, and the sureties cannot be ordered to pay over to the trustee in bankruptcy the amount so paid by the debtor.

APPEAL from a decision of the judge of the Manchester County Court dismissing a motion of the trustee in bankruptcy by which he asked for an order declaring that a payment of 250*l.* made by the bankrupt to the Union Loan and Discount Company of Manchester on June 22, 1899, was fraudulent and

(1) No appeal was brought against this decision.

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void as against the trustee, and, further, for an order directing the respondents G. W. Warren and J. H. Harrison to pay to the trustee the said sum of 250*l.*, together with interest from June 22, 1899, until payment.

The bankrupt, G. Warren, was a married woman carrying on business as a tobacconist apart from her husband under the name of E. Harrison. On June 19, 1899, she sold her business and stock-in-trade for 791*l.*; about 70*l.* was then due by her for rent, leaving a sum of 721*l.*, which was the whole value of her estate. She was then insolvent, her trade debts amounting to about 1658*l.* She owed the Union Loan and Discount Company 250*l.* upon a joint and several promissory note of herself and the respondents, who were her husband and brother, and who had signed the note as sureties; and on June 22, 1899, she paid the sum of 250*l.* to the Union Loan and Discount Company in discharge of her debt to them, receiving back the promissory note. On July 24, 1899, she was adjudicated a bankrupt on her own petition of the same date. The trustee in bankruptcy subsequently moved in the county court for an order that the payment of 250*l.* to the Discount Company constituted a fraudulent preference of the respondents, and that the respondents should pay him the 250*l.* for the benefit of the estate. The learned county court judge found as a fact that the payment to the Discount Company was made with the dominant view of preferring the respondents, but he held that, having regard to the principle laid down in the Court of Appeal in *In re Goldsmid, Ex parte Taylor* (1), and *In re Mills* (2), that a preference to be fraudulent must be a preference of and a payment to the creditor intended to be preferred, there had been no fraudulent preference. He therefore dismissed the motion. The trustee appealed.

T. F. Byrne, for the appellant. The respondents were creditors who could be preferred within the meaning of s. 48 of the Bankruptcy Act, 1883. A surety, who has a right of proof under s. 37, sub-s. 8, of that Act in respect of his contingent liability as surety, is a creditor within s. 48: *In re*

(1) (1886) 18 Q. B. D. 295. (2) (1888) 5 Morr. 55.

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Herapath, Ex parte Delmar (1); he is therefore a creditor who may be preferred and upon whom an order for repayment, if he is in fact preferred, may be made at the instance of the trustee in bankruptcy: *In re Paine, Ex parte Read.* (2) It is true that in *In re Mills, Ex parte Official Receiver* (3), the Court of Appeal held that the payment impeached as fraudulent must be made to the person intended to be preferred; but that case is distinguishable on the facts. It would only apply if the trustee were seeking to obtain an order for repayment against the Discount Company. It is clear from *In re Paine, Ex parte Read* (2), that the trustee may obtain an order for repayment by the person preferred, although he did not in fact have the money from the debtor. *In re Goldsmid, Ex parte Taylor* (4), upon which the county court judge relied, is not in point.

Reed, Q.C., and *Muir Mackenzie*, for the respondents, referred to *In re Parrott, Ex parte Whittaker* (5), and *In re Howell, Ex parte Trustee* (6), but were not called upon to argue.

WRIGHT J. I think that the appellant has been unable to satisfy the section, and to shew that this payment was a payment to or in favour of the respondents, and made with a view of preferring them to the other creditors. The learned county court judge found, and I think rightly found, that the payment was made with the intention of preferring the respondents, but it was in fact made, not to them, but to the Discount Company. I think that no sufficient grounds have been shewn for treating the payment as having been made to or in favour of the respondents. It was made by the debtor in order to discharge her debt to the Discount Company, and the money was kept by them and not applied to any other purpose than the discharge of that debt, and the result of the payment was that the makers of the promissory note were released from all liability upon it. But that does not make the payment a payment to or in favour of the respondents.

(1) (1890) 7 Morr. 129.
(2) [1897] 1 Q. B. 122.
(3) 5 Morr. 55.
(4) 18 Q. B. D. 295.
(5) (1891) 8 Morr. 49.
(6) Unreported.

The only case that appears to be at variance with this view is that of *In re Paine, Ex parte Read* (1), where I agree that the Court held that the payment, though nominally a payment of the creditor, must be treated as a payment to or in favour of the acceptor of an accommodation bill drawn by the debtor. But in *In re Mills, Ex parte Official Receiver* (2), there are dicta of the Court of Appeal which this Court cannot overlook, although the judgment was founded upon the case of *In re Goldsmid, Ex parte Taylor* (3), which is not reported as deciding any point of this kind. In *In re Mills, Ex parte Official Receiver* (2), the Lords Justices seem clearly to have taken the view that in order to constitute a fraudulent preference the payment must be made to or for the person intended to be preferred. I think, therefore, that this appeal must be dismissed.

PHILLIMORE J. I am of the same opinion. This motion was really launched on the supposition that the respondents had got the bankrupt's money, whereas nothing of the kind is the case; by the operation of the law as to fraudulent preference it might be possibly contended that the Discount Company had got it, but the respondents clearly never had. It is obvious that the trustee could not with any hope of success have moved to make the respondents repay money which they had never had, or have sued them for money had and received. The only embarrassment that I have felt during the argument has arisen from the case of *In re Paine, Ex parte Read* (1); but I think that the explanation of that case must be that the Court treated the payment, though made to the debtor's own banking account, as having been in substance a payment made to or in favour of the acceptor of the accommodation bill drawn by the bankrupt.

Appeal dismissed. Leave to appeal.

Solicitor for appellant: *J. H. Cooper, Manchester.*

Solicitors for respondents: *R. B. Wheatly, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

(1) [1897] 1 Q. B. 122. (2) 5 Morr. 55.
(3) 18 Q. B. D. 295.

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March 16.

[IN THE COURT OF APPEAL.]

ILLINGWORTH *v.* WALMSLEY.

Employer and Workman—Compensation—Accident causing Injury—Amount of Compensation—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clauses* 1 (*b*), 2.

Sched. I., clause 2, of the Workmen's Compensation Act, 1897, which provides that in fixing the amount of a weekly payment regard is to be had to the difference between the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, does not operate so as necessarily to cut down the maximum rate of compensation allowed by clause 1 (*b*) of the schedule.

APPEAL from a decision of the judge of the Blackpool County Court in an application for compensation under the Workmen's Compensation Act, 1897.

The respondent, who was a workman in the employment of the appellant, received serious injury to his hand on December 20, 1898, while cutting teak at a circular saw, and on December 22, 1898, he gave notice of the accident to the appellant. His wages prior to the accident averaged 1*l.* 13*s.* 8*d.* per week, and the appellant paid him half this sum (16*s.* 10*d.*) weekly until May 27, 1899, on which day he resumed work at the weekly wage of 15*s.* On September 19, 1899, the respondent filed a request for arbitration in the county court in order to have compensation for his injury assessed. The point that the proceedings were not taken within the time limited by s. 2 was not taken by the employer in his answer as required by rule 17 (1.) of the Workmen's Compensation Rules, 1898, and the county court judge refused to allow the answer to be amended; the Court of Appeal held that this point was therefore not open to the appellant. The learned county court judge awarded the respondent a sum of 15*s.* a week.

The employer appealed.

J. D. Crawford, for the appellant. The county court judge

has given no effect to clause 2 of Sched. I., but has practically given the respondent the maximum compensation that he would have been entitled to under clause 1 (*b*) if he had been unable to go back to work. (1) Taking clause 1 (*b*) and clause 2 together, the effect is that a workman who after an injury goes back to the same employer at reduced wages is only entitled to 50 per cent. of his loss. In the present case the respondent's loss was 18*s*. 8*d*. a week, being the difference between 1*l*. 13*s*. 8*d*., which he earned before the accident, and 15*s*., which were his wages afterwards; he is therefore only entitled to compensation at the rate of 9*s*. 4*d*. a week.

F. H. Mellor, for the respondent, was not called upon to argue.

A. L. SMITH L.J. I am of opinion that this appeal must be dismissed. Clause 2 has not the effect contended for, and does not operate necessarily to cut down the maximum compensation allowed by clause 1 (*b*).

COLLINS L.J. I am of the same opinion. There is an express provision in clause 1 (*b*) limiting the amount of compensation to 50 per cent. of the average weekly earnings. The language of clause 2 is very different: it says that regard is to be had to the difference between the workman's earnings before and after the accident; but how that regard is to be had, or what is the effect of it, it is not easy to see. I am not able to

(1) By the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. I., clause 1, "The amount of compensation under this Act shall be . . . . (*b*) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

By clause 2, "In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity."

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say that by advisedly using different phraseology in the latter clause the Legislature did not intend to preserve the same maximum which had already been laid down in clause 1 (*b*).

ROMER L.J. I agree. All that clause 2 means is that the tribunal assessing the compensation is to bear in mind and have regard to the average weekly wages earned before and after the accident respectively. Bearing that in mind, a limit is placed on the amount of compensation that may be awarded, and the only absolute limit is that which is found in clause 1 (*b*) —namely, half the amount of the average weekly earnings before the accident. There is no evidence that the county court judge did not have regard to the difference between the earnings of the respondent before and after the accident, and in my judgment the point is almost unarguable.

Appeal dismissed.

Solicitors for appellant: *Mellor, Smith & May, for Rawsthorn, Ambler & Booth, Preston.*

Solicitors for respondent: *Busk, Mellor & Norris, for Callis, Blackpool.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1900
March 16.

POWELL *v.* THE MAIN COLLIERY COMPANY.

Employer and Workman—Compensation—Arbitration—Time for commencing Proceedings—"Claim for Compensation"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-s.* 1.

By s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, proceedings for the recovery under that Act of compensation for an injury are not to be maintainable unless notice of the accident has been given as soon as practicable, "and unless *the* claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury. . . . ."

A workman who had been injured in the course of his employment sent to his employers within six months a notice of the accident, and also a notice stating that he claimed compensation for the injury received by him. More than six months after the accident he filed a request for arbitration in the county court:—

Held, by A. L. Smith L.J. and Collins L.J., Romer L.J. dissenting, that "*the* claim for compensation" contemplated by s. 2, sub-s. 1, was the initiation of proceedings before the tribunal by which the compensation was to be assessed, and not a mere notice of a claim for compensation sent to the employers of the workman; that the request for arbitration should, therefore, have been filed within six months of the accident, and the proceedings were consequently out of time.

APPEAL from a decision of the judge of the Neath County Court in an application for compensation under the Workmen's Compensation Act, 1897.

The respondent, a workman in the employment of the appellants, who were colliery owners, had been injured on December 21, 1898, by an accident arising out of and in the course of his employment. On May 2, 1899, he gave to the appellants a written notice of the injury, and also a further notice claiming 15*s.* per week from January 4, 1899, until he should be able to resume work, as compensation for the injury received by him. On October 4, 1899, he filed a request for arbitration in the county court in Form 1 of the forms under the Act. It was contended on behalf of the appellants that the proceedings were out of time, and that the request for

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arbitration should have been filed within six months from the date of the injury; but the learned county court judge overruled the contention, and made an award of compensation in favour of the respondent.

The employers appealed.

Ruegg, Q.C., and *Bertram*, for the appellants. The request for arbitration was out of time. By s. 2, sub-s. 1, of the Act the claim for compensation must be made within six months of the accident, and the expression "claim for compensation" as there used includes a request for arbitration, which is the claim in the arbitration proceedings. This is clear upon a consideration of s. 1, sub-s. 4, which speaks of the time limited in the Act for taking proceedings, and which should be read together with s. 2, sub-s. 1. (1) The Legislature clearly meant to limit a time for taking proceedings for the assessment of compensation, and that limit can only be six months. If this limitation is not imposed by the Act, then the time is unlimited, for proceedings under the Act are not actions, but arbitration proceedings, to which the Statutes of Limitations do not apply. The intention of the Legislature was to place a limit on the initiation of proceedings under this Act corresponding to the six months' limit placed upon the commencement of proceed-

(1) By s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death."

By s. 1, sub-s. 4, "If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act."

ings under the Employers' Liability Act, 1880, by s. 4 of that Act. The "claim for compensation" means the initial step in the proceedings before the tribunal by which the compensation is to be assessed. No doubt a difficulty arises from the existence of informal courts of arbitration, such as the representative committee of employers and workmen, it being difficult to say what is the commencement of proceedings in such cases; that must, however, be a question of fact in each case, and the commencement of the proceedings must be the first step which gives the tribunal (whatever it may be) seisin of the dispute between the employer and workman. In *Bennett* v. *Wordie & Co.* (1) a strong opinion was expressed by the Lord Justice-Clerk and Lord Trayner that a claim for compensation under this Act meant a judicial claim, and was the same thing as proceedings for the recovery of compensation; that opinion, though not necessary for the decision of the particular case, is a strong authority in favour of the contention of the appellants.

S. T. Evans, for the respondent. The respondent has complied with the requirements of the Act by serving upon the appellants a notice of the accident and a claim for compensation; a request for arbitration is not a claim for compensation, and need not be filed within six months of the accident. A claim for compensation is a claim served upon the master and specifying what compensation the workman requires. Form 1 is strongly in favour of the respondent's contention; it is a request by the workman for arbitration, but it contains no claim for compensation, nor is it described as a claim for compensation in the rules. There is no force in the contention that the workman might for an unlimited time delay taking proceedings, and that the master could not force him on, for the latter could himself file a request for arbitration and could fill up the particulars required by Form 1; and, further, the effect of rules 64 and 67 of the Workmen's Compensation Rules is to allow the forms of requests for arbitration to be adapted to applications by the master. The forms are drafted to meet the requirements of ordinary cases, and by rule 10 the forms of

(1) (1899) 1 F. 855; 36 S. L. R. 643.

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request and particulars may be modified. Under s. 1, sub-s. 3 (1), of the Act arbitration can only be resorted to where a question as to liability to pay compensation has arisen in proceedings under the Act; the "proceedings" contemplated by that sub-section must, therefore, be something anterior to the initiation of arbitration proceedings, and can only refer to the claim for compensation made by the workman upon his employer and the negotiations consequent thereon. If the appellants' contention is right, a claim might be brought before a representative committee just before the expiration of the six months, and if the committee failed to settle the matter within the three months allowed by Sched. II., clause 2, the workman would be unable to file a request for arbitration, for a request would then be out of time. The observations of the judges in *Bennett* v. *Wordie & Co.* (2) are merely obiter dicta, and should not be followed.

Ruegg, Q.C., in reply. No doubt a difficulty is raised by reason of the word "proceedings" being loosely used in s. 1, sub-s. 3, but the language of s. 1, sub-s. 4, is definite, and is a direct imposition of a limit of time for "taking proceedings" to recover compensation, and that limit, when regard is had to s. 2, sub-s. 1, can only be six months. The rules and forms as to requests for arbitration are framed on the assumption that the claim for compensation is made by the workman, and are not applicable to proceedings by the employer in the county court.

A. L. SMITH L.J. The question for our decision has given rise to great difference of opinion among the learned county court judges throughout the country, though when it has been considered in Scotland and in Ireland in the superior Courts

(1) By s. 1, sub-s. 3, "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the first schedule to this Act, be settled by arbitration, in accordance with the second schedule to this Act."

(2) 1 F. 855; 36 S. L. R. 643.

there has been no difference of opinion. (1) The decisions of the Scottish and Irish Courts do not bind us, and for myself, if I thought they were wrong, it would be my duty to say so. But having heard this case fully argued to-day, and having heard the same point partially argued on some previous occasions, I have arrived at the same conclusion as the above-mentioned Courts as to the meaning of the expression "the claim for compensation" in s. 2, sub-s. 1, of the Workmen's Compensation Act. Does the expression mean "any" claim for compensation which an injured man may send to his master, or does it mean "*the*" claim for compensation which the injured man has to make in order to give jurisdiction to the tribunal which is to decide his case?

In the first place it seems to me that the time within which a man may proceed against his master under the Workmen's Compensation Act has been taken from the provisions of the Employers' Liability Act, which is an Act cognate to the Workmen's Compensation Act. The time at which the workman can take proceedings against his employer under the Employers' Liability Act is perfectly clear. The marginal note of s. 4 of this Act is, "Limit of time for recovery of compensation," and the section enacts, "An action for recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident." It is clear that under that Act there must be notice given of the injury within six weeks; under the present Act this notice is to be given as soon as practicable, and I think that the difficulties which have arisen in this case are due to the fact that the Legislature, when adopting the limit of time for the Workmen's Compensation Act from the Employers' Liability Act, could not make use throughout of the same phraseology, and could not enact

(1) The Irish decision, which was not mentioned by name during the argument, was *Marno* v. *Workman, Clark & Co.*, 33 Ir. Law Times Rep. 183, a decision of the recorder of Belfast. The judgment was unanimously affirmed by the Court of Appeal in Ireland on January 12, 1900, but this decision has not yet been reported.—REPORTER.

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that "the action" should be brought within six months, because under the Workmen's Compensation Act there is no such thing as an "action," the whole matter being an arbitration from beginning to end. What the Legislature did was to adopt with slight variation the first part of s. 4 of the Employers' Liability Act, and to enact in s. 2, sub-s. 1, of the Workmen's Compensation Act that "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof"; so far the two sections are substantially identical, the only difference being that in the one case notice of the accident is to be given within six weeks, and in the other case as soon as practicable. In the remainder of the section the phraseology necessarily changes; it could not enact "unless the action be brought within six months," so it enacted "and unless *the* claim for compensation with respect to such accident has been made within six months." What is the claim for compensation here referred to? The question is whether this expression means a mere notice by the workman to the master claiming compensation, or whether it means the commencement of proceedings in the tribunal which is to decide the case, either by the claim for compensation which is to be found in the forms, or by the initiation of some proceeding which sets up the claim in such a manner that it will result in proceedings, judicial or otherwise, which will allow the man to get the advantage of an adjudication by the assessing tribunal.

There are undoubtedly difficulties in this Act, and, looking at s. 1, sub-s. 3, I should say that "proceedings" in that subsection did not mean the initiation of the proceedings by taking what I may call judicial proceedings. I do not think that is the meaning of that sub-section, but if we go one step farther back and consider s. 1, sub-s. 2 (*b*), which uses the expression "and shall not be liable to any proceedings independently of this Act," I think myself that that can only mean what in my opinion the word "proceedings" means in s. 2, sub-s. 1, namely, the initiation of proceedings either before the committee, the county court judge (who is an arbitrator), or before a sole arbitrator

agreed upon by the parties. Now it is said that that is not so. It is said, How are proceedings to be commenced which will culminate in an adjudication, when the tribunal is to be, not the county court judge, but a sole arbitrator, or a representative committee? I will consider, first, the case of a representative committee of an employer and his workmen. How are proceedings to be commenced with the view of getting an adjudication and an award from them? I do not myself see any difficulty. The man can give notice to the committee which represents himself and his master and say, "I have met with an accident in my master's pit, and I ask you to adjudicate between my master and me. Please take up the proceedings and adjudicate thereon"; that would be in my judgment a claim for compensation, for he would have gone to the tribunal which had to adjudicate upon the matter, and have made a claim to them for compensation and initiated the proceedings; the claim would not be a claim upon the other side, that is, upon the master, but a claim to the tribunal which had to adjudicate between them. Much the same course might be taken if an agreed arbitrator was to be the tribunal. The workman might appoint an arbitrator, and, if that arbitrator was agreed to, the workman could say, "This is my claim which is to be arbitrated upon between me and my master." These considerations, however, only touch the fringe of this matter, and require no decision by us.

What was done in this case was this. The workman met with an accident on December 21. On May 2 he gave two notices to his master; the first runs: "Please take notice that on December 21, 1898, William Powell of Mount Pleasant"—and so on—"was injured," and is signed "William Powell." This notice is in print, and evidently was sent on behalf of the respondent by some union or agency. The second notice was to this effect: "Take notice that I claim the sum of 15*s.* per week from January 4, 1899, until such date as I shall be able to resume work, as compensation for injuries received on December 21." I agree that this is "a" claim for compensation, but is it "the" claim mentioned in the Act?

As I have already said, the master in my judgment

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undoubtedly is protected by a six months' limit. Let us look at the language of s. 1, sub-s. 4; it comes immediately after sub-s. 3, in which the word "proceedings" probably means something different to what I am about to say; but after considering sub-s. 4, I think one can discover the meaning of the expressions "proceedings" and "claim for compensation." That sub-section says, "If, within the time hereinafter in this Act limited for taking proceedings." What is the meaning of that expression, "taking proceedings"? Does it mean, as used in sub-s. 4, the sending of a notice to the master that he, the workman, is going to claim compensation? I do not think so. I think that the proceedings contemplated by that sub-section and by s. 2, sub-s. 1, are the initiative proceedings before the assessing tribunal which would culminate in an award. The notice of accident which, under s. 2, sub-s. 1, is to be given as soon as practicable is, of course, a notice given to the master, a notice which will enable him to come down and see what condition the man is in at once after the accident, and "the claim for compensation," which is to be made within six months, is in my view the claim to the court or tribunal which is to decide the question, in other words, that which is the equivalent of commencing legal proceedings.

Now I wish to point out what would be the position if the reading contended for by the respondent is correct. The master is, as I have before said, entitled to immunity after six months from the date of the accident, if proceedings have not been commenced by then. It is the only provision in the Act clearly in favour of the master. If a workman makes a claim upon his master for compensation, as in the present case, and takes no further step, and allows the matter to rest for twelve months or twenty or more, what is the master to do? It is said that he can initiate proceedings for himself. I do not agree with that contention, but it is the only suggestion made by the man to get out of the difficulty he is in. The Workmen's Compensation Act was drafted throughout and passed for the purpose of giving the workman a claim against his employer, not for the purpose of the employer taking any proceedings against the man. It is said that all the rules under

the Act can be altered, but it must be admitted that every rule which has been drawn for the purpose of carrying out this Act applies on the face of it only to proceedings taken by a man against his employer, and not to proceedings by the employer against the man. It is said that these rules could all be made to fit the case of the master taking proceedings against the man; I do not agree. In my opinion, if this Act and the rules under it were drawn with the view that the master should be able to take proceedings against the workman so as to prevent a claim from hanging over the master's head, it is strange that some definite provision cannot be found enabling the master to take proceedings so as to drive the man on; whereas if "the claim for compensation" be the initiation of the proceedings before the assessing tribunal, then the master can compel the man to go on, and thus prevent the case hanging over his head it may be for years.

I cannot think that the rules have any application to the initiation of proceedings for the assessment of compensation by the employer. The heading of Form 1 is, "Application for arbitration by an injured workman with respect to the compensation payable to him." Then come the name and address of the applicant and of the respondents. Then it proceeds: "An arbitration under the Workmen's Compensation Act, 1897, is hereby requested between A. B." (the applicant) "and C. D. & Co., Limited" (the respondents), "as to the amount of compensation payable to the said A. B. under the said Act in respect of personal injury caused to the said A. B. . . . ." Then come various particulars, including "(11.) Amount claimed as compensation. (12.) Date of service of statutory notice of accident on respondents, and whether given before workman voluntarily left the employment in which he was injured." Then the names and addresses of the applicant (the workman) and of the respondent (the master) and their respective solicitors. There is a remark to be made upon this form. If a claim for compensation other than this document (and this is itself a claim for compensation) was contemplated by the statute, it seems remarkable that there should not have been included in these particulars the date when the claim for compensation was

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lodged or served on the employer. The particulars include the date of service of the statutory notice of the accident, which must be given as shortly as possible after the accident, but nothing is said about the service of a notice of the claim upon, or the giving of a notice of claim like the present to, the master. Why is that left out? A consideration of this form leads to the conclusion that it was left out simply because this request for arbitration is "the claim for compensation" which the statute contemplates. Having given this case my best attention, I have come to the conclusion that this document which was sent to the master was not "the claim for compensation" contemplated by s. 2, sub-s. 1, of the Act.

I wish also to point out that unless the Scottish and Irish decisions were clearly wrong, it would be inadvisable to have a different law in this country, for this question affects probably every case of compensation under the Workmen's Compensation Act here and in Scotland and Ireland. Without, however, feeling myself in any way bound by those decisions, I think for the above reasons that they were right, and that these proceedings were not taken in time, and the appeal must, therefore, be allowed.

COLLINS L.J. I am of the same opinion. My Lord has gone so fully through the grounds upon which he rests his view that I propose to add only a few words. I agree with him that we are entitled to look at the state of legislation at the time when this Act was passed, and I find that it was the policy of the Legislature to impose a limit of six months upon the bringing of actions under the Employers' Liability Act, 1880, and that the two conditions imposed by that Act are reproduced with very slight differences in the Act now under discussion.

I do not think it is possible to give any clear and satisfactory interpretation which will be perfectly consistent with all the provisions of this Act; I have long since come to the conclusion that that is impossible, and therefore I have to make the best guess that I can at what the Legislature must be taken to have meant in the particular sections that we are dealing with. I

think that there is a clear indication in s. 1, sub-s. 4, and in s. 2, sub-s. 1, that the Legislature intended to impose a limit of six months on the putting of rights in suit under this Act. Sub-s. 4 says: "If within the time hereinafter in this Act limited for taking proceedings, an action is brought." Then we look down to see what is the time limited in the Act for taking proceedings, and we find that the only words that can be referred to are those in s. 2, sub-s. 1, "The claim for compensation with respect to such accident has been made within six months": these are the words under which the time limit is given. Then, what does the Legislature do? It says that if an action is brought, whether at common law or under the Employers' Liability Act, the applicant is to have a right to a remedy under the Workmen's Compensation Act, but only if the action is brought within the time limited in the Workmen's Compensation Act, that is, within six months. Why is that limit imposed in that section? The argument for the respondent is that the time for taking proceedings under the Act is absolutely unlimited, that is to say, that if a workman has made a claim such as the respondent made in this case, a claim which does not commit him to proceedings of any kind, he is at large to start his judicial proceedings whenever he likes. If that be his right, why does the Legislature in effect say, "If you choose, having brought another action, to claim the benefit of the Workmen's Compensation Act, under that Act you shall not do it after six months"? Is not that a clear indication that the legal proceedings, or proceedings taking the shape of legal proceedings, are not to be brought after six months? That seems to me to be clearly the intention of the Legislature, although there may be other provisions which it is difficult to square with that intention.

It is suggested that this is to place upon the word "proceedings" in s. 1, sub-s. 4, the meaning "judicial proceedings"; and that is true with regard to that sub-section, for it is dealing there with an action at law, and it says that in that action at law the workman shall not put in suit his rights under the Workmen's Compensation Act except within the limit of six months. But I do not think it is necessary to

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limit the word "proceedings" wherever used in the Act to proceedings in a court of law. The meaning which I put upon the word is that the proceedings must be proceedings which put in suit the right of the person claiming, which introduce the jurisdiction of that tribunal whose function it is to decide the matter between the parties and to put compulsion upon them; it does not mean some act or document which merely indicates an intention at some time or other to invoke the jurisdiction of the tribunal. The proceeding must itself be the invocation of the jurisdiction of the tribunal; it is that, if it is a demand for arbitration in the county court; it is equally that, if it is a demand for arbitration by a committee or any other arbitrator, provided the subject-matter lies within the jurisdiction of that tribunal. A mere threat that in certain events proceedings will be taken is not an initiation of proceedings. Unless the step which is taken introduces the jurisdiction of the tribunal, it does not seem to me to be that step which constitutes the initiation of the proceedings, and which is compendiously abbreviated by the words "claim for compensation" in s. 2, sub-s. 1.

That is the main ground upon which my decision rests. I agree with my Lord that the forms are certainly primâ facie not intended to give the master any right of initiating proceedings at all, and I do not think they were designed with that purpose in view. If that be so, and if the respondent's argument is right, this extraordinary position of affairs would result—that a master having had such a notice as this served upon him, which does not initiate proceedings, is bound to wait for an unlimited time with the risk of proceedings being taken against him and with no means of ascertaining finally whether they are going to be taken or not. That anomaly has been met very ingeniously by the respondent's counsel, who has pointed out words in the different forms which I do not deny may, by a considerable amount of ingenuity, and I think by some strain upon one's imagination, be made to cover the case of the initiation of proceedings by a master. But I do not think any one can look fairly and frankly, uninstructed by the ingenuity of the respondent's counsel, at these rules and

come to any other conclusion than that they were designed to do what they purport to do, namely, to deal with applications by the applicant, that is, the workman, and not with applications by the master, except in the one case of the review of weekly payments, where the statute itself contemplates either side invoking the jurisdiction of the tribunal. I am fortified in this conclusion by what was, I think, the decision of the whole Court of Session in Scotland—certainly it was the actual decision of two of the judges of that Court—and by the Irish decision, which has been mentioned, but which I have not seen.

ROMER L.J. I regret that in this case I feel bound to differ from my brethren, especially as I find I also differ from certain decisions both in Scotland and Ireland on the point, but as I take a clear view with regard to the construction of this Act, I think it is my duty to express it.

The only section of the Act which in precise terms puts any limit to proceedings of any kind is s. 2. Other sections may be referred to as casting a light upon s. 2; but s. 2, sub-s. 1, in itself must be the section to which one must refer in order to find what limit has been imposed upon proceedings under the Act. Sect. 2 in itself only says this—that before proceedings for the recovery under this Act of compensation for an injury can be maintained (apart from notice of the accident being given) a claim for compensation with respect to such accident must have been made within six months from the occurrence of the accident causing the injury. The words are, "*the* claim for compensation with respect to such accident has been made within six months." Those words seem to me to be reasonably clear in themselves. I agree that they do mean a specific claim for compensation under the Act, but I fail to see why we should by mere implication, and not a necessary implication, as I hope to shew, depart from what appear to me to be the plain words of the Act of Parliament. The section does not say, "unless proceedings have been taken for arbitration"; it does not necessitate that application should

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have been made to the representative committee referred to in Sched. II., clause 1; still less does it refer to any application made to the county court judge as arbitrator. We ought not to import words into this Act of Parliament unnecessarily. I think that what the Act contemplated was this—that there should be something done within the six months which would pledge the workman to the position that he was intending to make a claim under the Act, and I think that in effecting this the Act was referring in s. 2 to what had been provided in s. 1, sub-s. 2 (*b*), where it points out that in certain cases, that is, in a case where the injury had been caused by negligence or wilful act of the employer, the workman might at his option either claim compensation under this Act, or take the same proceedings as were open to him before the passing of the Act. That is to say, it appears to me that the policy of the Act was that the workman should within six months definitely make up his mind whether he was or was not going to claim under this Act; if within six months he made his claim, it seems to me that he had done all that was required of him under s. 2, sub-s. 1.

Let me give an illustration of my meaning, if I have not already made it plain. The workman within the six months says to his employer, "I hereby claim under the Workmen's Compensation Act the following compensation for my injury," giving the particulars of the compensation claimed and of the injury, so that it is perfectly clear beyond question that it is a claim for compensation under the Act. I fail to see why that is not to be regarded as a claim for compensation within s. 2, sub-s. 1. It is to be borne in mind that before arbitration can be resorted to at all, either before the special committee, or before any other arbitrator or before the county court judge as an arbitrator, there must be a question arising between the parties—there must be a difference. How can there be a difference which will entitle either party to go to the committee or to the arbitrator, unless a claim has been made which is challenged, which is denied, and which is refused? Then and only then does a question arise.

The claim for compensation, then, is really the essence of the proceedings by the workman, and it is, as I think I can shew from other parts of this Act, contemplated as a proceeding in itself, and, as I am pointing out, it is the most important proceeding, for when it is made, unless there is a dispute, there is an end of the matter—the master may accede to it. Suppose a claim under the Act was made by a workman within six months, and the master was not certain whether or not he would accede to the terms, and negotiations ensued until the six months had expired, and then it turned out that the parties could not agree and a dispute arose, it must be said against the workman, according to the opposite view, that then he is debarred from his remedy. He has made his claim for compensation; he could not have gone, as I wish to point out, to arbitration before, because there had been no question and no dispute. Of course, if the master were shilly-shallying, the workman could, I have no doubt, treat it as a refusal to comply with his demand for compensation, and say that a question had arisen within the meaning of the Act.

I think that great light is thrown upon this question by s. 1, sub-s. 3, which says, "If any question arises in any proceedings under this Act"—mark those words, "any proceedings under this Act"—"as to the liability to pay compensation under this Act, (including any question as to whether the employment is one to which this Act applies,) or as to the amount or duration of compensation under this Act, the question if not settled by agreement shall, subject to the provisions of the 1st schedule to this Act, be settled by arbitration in accordance with the 2nd schedule to this Act"; that is to say—and this is important—that before the parties go to arbitration the Act says that proceedings under the Act must have arisen. So that this Act contemplates some "proceedings" which take place before arbitration. What are those proceedings? They can in my judgment only be the claim for compensation and the refusal to comply with it, so that the claim for compensation is a proceeding under the Act, and is, as I have already said, the most important proceeding under it. Sub-s. 3 casts light upon what is meant by sub-s. 4, and it is really owing to the curious

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wording of sub-s. 4 that to my mind the whole difficulty in this case arises; but I think that that difficulty is got rid of when we bear in mind what has already been said in sub-s. 3, as well as what is going to be said in s. 2, sub-s. 1, because "proceedings," as I have pointed out, include something done prior to arbitration. Sub-s. 4 begins with the words, "If within the time hereinafter in this Act limited for taking proceedings"; in other words, for the purposes of that sub-section as well as for the purposes of sub-s. 3, "proceedings" include a claim for compensation; then we see the meaning of sub-s. 4. Was the time limited for taking proceedings, if under "proceedings" is included the claim for compensation? Yes, for then, under s. 2, sub-s. 1, proceedings must be taken within six months from the date of the injury. That removes any difficulty to my mind that may otherwise arise upon sub-s. 4, and makes the whole Act plain and intelligible. I see no reason, either in the Act itself or in principle, why we should enlarge the plain words of this Act and say that it means something which the Legislature has not said that it means. Other portions of the Act, and certain of the rules and forms under the Act, have been referred to; I do not propose to go through them; it will be sufficient to say that in my opinion there is nothing in them which would justify this Court in coming to the conclusion that "the claim for compensation" means anything more than what I have said.

A difficulty in the way of my view was suggested by Collins L.J. as arising under sub-s. 4, because it is said that the workman might only make a claim for compensation and then bring an action at common law after the six months, and then, if he failed in that common law action, might proceed with his claim under the Act, because he had made the claim within the six months. But if a man made a claim under the Workmen's Compensation Act, and then after the six months brought a common law action, I cannot help thinking he would waive his claim, bearing in mind the provision I have called attention to as to the obligation cast upon the workman to elect. But even if I were wrong in that view and he was

not bound to elect, and he did not waive his notice by bringing the common law action, the very same difficulty would arise in the opposite point of view, because, if the true construction is that some proceedings must have been initiated within the six months before the arbitrating tribunal, the workman might merely initiate those proceedings within the six months, and commence his common law action afterwards. The same difficulty would, therefore, arise with regard to that construction.

A more difficult point to deal with is the contention that the effect of holding that the claim for compensation means only what I have suggested is that the master might thereby be kept waiting for an unlimited period without being able to force the workman to proceed with his claim. If that contention were correct, I agree that it would be a formidable argument against the view which I am taking, but in my opinion it is not correct. Assume that the workman once makes a claim for compensation and the master contends that he is not entitled to what he claims; then I refer to the Act, and I find in s. 1, sub-s. 3, the expression, "if any question arises in any proceedings under this Act," &c. I have shewn that in that sub-section the word "proceedings" means claim for compensation and refusal. In the case I have indicated, why has not a question arisen in a proceeding under this Act within the precise words of the Act of Parliament? If the workman has made his claim and the master has refused it, why has not the question arisen? The question, in my opinion, has arisen, and then under the precise provisions of the Act it is to be settled by arbitration. What is there to prevent, in such a case, the master at once taking the dispute that has arisen to the special committee, for example? None, that I can see. Why, if the special committee cannot deal with the question, should not it then go before the county court judge? There is nothing to prevent it, either in the Act of Parliament or in the rules. The only argument to the contrary is founded on the forms to the rules. Forms are mere machinery. If the right to go is clear by Act of Parliament—and, in my opinion, it is—a form cannot prevent the party

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going to the tribunal pointed out by the statute. But no difficulty, to my mind, arises on the forms: they deal only with the most likely cases to arise; they do not intend to deal with extraordinary cases. Now, would it not be an extraordinary case to suppose that when a workman had made a claim for compensation, and the master refused to agree to it, the workman should stand by for six years and not proceed? It would, I think, be a most extraordinary case. Is it to be wondered at that no form can be found specially dealing with such a case? The objection that the master cannot compel the workman to go on in such a case is theoretical; but, assuming the theory, it can be met by a theory—and a good theory, too—that the master can force the workman on in such an extraordinary case. If there had been no such rule as rule 67, I should still have said that the forms were machinery and that the absence of a special form was no answer to the right of the master to demand arbitration, when, as I have pointed out, the Act of Parliament has clearly given him the right to demand it. But I find that rule 67 provides that, "The forms in the appendix, where applicable, and where they are not applicable forms of the like character with such variations as the circumstances may require, may be used in proceedings under the Act." The master has only to take a form and adapt it to his special case, and, in my opinion, he is entitled to demand arbitration under such circumstances as I have indicated, and to compel the county court judge, if there is no special committee, to arbitrate upon the question. Therefore, in my opinion, this objection taken to the view which I have formed cannot be sustained.

For these reasons it appears to me that we ought to keep to what I have already said is the clear meaning of the Act of Parliament; we have no right to alter it by implication, and, moreover, I think that to do so would be to create great difficulties in the way of both employer and workman, and would cause unnecessary and great hardships. I cannot think that the conclusion at which my brethren have arrived is, for the reasons I have given, the right conclusion; in my opinion we ought to hold the contrary, although I agree that the point

is one of some difficulty, and I have differed with great reluctance.

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Appeal allowed.

Solicitor for appellants: *H. P. Becher, for Vazie Simons, Pontypridd.*

Solicitors for respondent: *Sharpe, Parker, Pritchards, Barham & Lawford, for Cuthbertson & Powell, Neath.*

W. J. B.

[IN THE COURT OF APPEAL.]

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THE QUEEN *v.* BULLIVANT AND OTHERS.

Practice—Discovery—Production of Documents—Privilege—Communications between Solicitor and Client—Evasion of Statute.

The privilege from production of confidential communications between a solicitor in his professional capacity and his client does not extend to communications which came into existence for the purpose of the client's procuring advice as to the mode in which he might evade the provisions of a colonial statute imposing a duty in respect of property.

APPEAL from an order of Mathew J. at chambers directing Stanley Austin, one of the defendants, to produce certain documents.

An information was filed by the Attorney-General of the Colony of Victoria in Australia, in the Supreme Court of that colony, against the executors of the will of James Austin, deceased, and others, claiming duty on certain property, under the Administration and Probate Act, 1890 (54 Vict. No. mlx.), of that colony. The information alleged that the testator, who died in 1896, had, in 1894 and 1895, executed certain voluntary conveyances of property belonging to him in Victoria with intent to evade payment of duty thereon under the before-mentioned Act of the colony. Probate of the will had been obtained upon his death both in this country and Victoria. The information claimed a declaration that the before-mentioned conveyances were respectively made with intent to evade payment of duty under the Act, an account, if necessary,

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of the duty under the Act payable in respect of the property thereby conveyed, and an order for payment of the same by the defendants. The defence, in substance, did not appear to deny that the conveyances in question had been executed, but denied that they had been made with intent to evade the Act. It appeared that the conveyances, which were for the benefit of testator's children respectively, of whom the defendant Stanley Austin was one, had been prepared and carried out by a firm of solicitors in this country, styled Bath & Austin, upon instructions given by the testator. The defendant, Stanley Austin, was a member of the firm, but Mr. Bath was the member of it who acted with respect to the conveyances in question. He had since died, and Stanley Austin then carried on the business in partnership with another under the style of Austin & Bath. A commission had been issued from the Supreme Court of Victoria for the purpose of taking the evidence of (amongst others) the defendant, Stanley Austin, in this country. Upon being examined in pursuance of the commission he was asked on behalf of the informant whether he had in his office any book in which Mr. Bath or his clerk had entered instructions given to him by the testator with reference to the preparation of the before-mentioned conveyances. He said in answer that he had a book called the diary in which such instructions would be entered, but that he objected to produce it on the ground that it was held by him and his partner, as solicitors and successors to the solicitors of the testator, in their professional character, and was a professional document containing entries of communications of a professional and confidential character for the purpose of obtaining legal advice. An application was then made by the informant at chambers to Mathew J. for an order upon the defendant, Stanley Austin, to produce before the commissioners any journals, day-books, or other record kept by the late firm of Bath & Austin of the instructions given by the testator to that firm with reference to the preparation, execution, or carrying into effect of the conveyances in question. The learned judge made the order applied for.

By s. 115 of the Administration and Probate Act, 1890, of

the Colony of Victoria, "If any person has made, or shall hereafter make any conveyance or assignment, gift, delivery, or transfer of any estate, real or personal, or of any money or securities for money, with intent to evade the payment of duty under this part of this Act, in case such person shall die, the property comprised in any such conveyance or assignment, or the subject-matter of any such gift, delivery, or transfer, shall, upon the death of such person, be deemed to form part of his estate for the purposes of this part of this Act upon which duty shall be payable under this part of this Act, and the payment of the duty upon the value of such property may be enforced against such property in the same way as duty under this part of this Act is enforceable, and as if such person had bequeathed or devised the said property to the person to whom the same may have been conveyed, assigned, given, delivered, or transferred."

The defendants appealed against the order.

Ernest Pollock, for the defendants. The documents in question are privileged, being confidential communications between a solicitor in his professional character and his client, which have come into existence for the purpose of the client's obtaining legal advice. It is not necessary to the existence of the privilege that there should be a pending or contemplated litigation. [He cited *Minet* v. *Morgan* (1); *Calcraft* v. *Guest* (2); *Wheeler* v. *Le Marchant* (3); *Lowden* v. *Blakey* (4); *O'Shea* v. *Wood.* (5)]

S. A. T. Rowlatt, for the informant. It is not denied that these documents are relevant to the issue whether the conveyances in question were executed with intent to evade the colonial statute, but privilege is claimed for them as confidential professional communications between solicitor and client. It is submitted that the privilege with regard to confidential professional communications between solicitor and client does not extend to documents which come into existence for the

(1) (1873) L. R. 8 Ch. 361.
(2) [1898] 1 Q. B. 759.
(3) (1881) 17 Ch. D. 675.
(4) (1889) 23 Q. B. D. 332.
(5) [1891] P. 286.

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purpose of obtaining legal advice as to how a statute may be evaded. The case falls within the principle laid down in such cases as *In re Postlethwaite* (1) and *Reg.* v. *Cox* (2), namely, that, where the confidential communication between the solicitor and client is for the purpose of obtaining legal advice by the latter as to how to commit a fraud or illegality, it is not privileged. One reason is that it cannot be supposed to be part of a solicitor's professional business to advise a client how to commit a fraud or illegality. The same reason applies to advice as to evasion of a statute. [He also cited *Russell* v. *Jackson* (3); *Gartside* v. *Outram* (4); *Follett* v. *Jefferyes.* (5)]

Ernest Pollock, in reply. The testator might wish for legal advice from his solicitors as to the making of the conveyances in question without reference to any intention of evading the duty.

[COLLINS L.J. The issue being as to the intention with which the conveyances were made, if the documents are relevant to that issue, is not the onus on the defendant to shew that they are privileged on the ground that they came into existence for the purpose of the client's obtaining legal advice from a solicitor in his professional capacity?]

It is for the informant to make out at any rate a primâ facie case that the advice sought for was as to how the statute might be evaded.

COLLINS L.J. This is an appeal from the order of Mathew J. directing Stanley Austin, one of the defendants, to produce certain documents. The question raised is whether the defendant is privileged from the production of these documents on the ground that they are confidential communications between the testator and his solicitor, which came into existence for the purpose of the testator's obtaining professional advice from his solicitor. The question arises thus. An information is filed against the executors of the testator on the ground that before his death he executed certain voluntary conveyances

(1) (1887) 35 Ch. D. 722.
(2) (1884) 14 Q. B. D. 153.
(3) (1851) 9 Hare, 387.
(4) (1856) 26 L. J. (Ch.) 113.
(5) (1850) 1 Sim. (N.S.) 3.

with the intention and for the purpose of evading the provisions of a Victorian Act intituled the Administration and Probate Act, 1890. The issue raised upon the information is whether these conveyances were made with that intention and purpose. It was elicited in the course of the examination of the defendant Stanley Austin upon a commission that there was in his possession, as a member of the firm of Austin & Bath, solicitors, a certain document which he must be taken to admit to be relevant, because he objected to produce it, not as being irrelevant, but as being privileged on the ground which I have mentioned, namely, that it came into existence for the purpose of obtaining professional advice from him as the testator's solicitor. The question so raised therefore comes to this. The document being admitted to be relevant, it is claimed that it is privileged. Relevant to what? It must be to the issue whether the conveyances were executed with intent to evade the Act, for that is really the question at issue upon the information. It being admitted that the document is relevant, it lies upon the defendant to shew the existence of the privilege upon which he relies with regard to it. The question is whether the defendant has shewn the existence of such a privilege in a case where such conveyances are treated by statute as mischievous and a section is framed to defeat them. I do not think that the privilege relied upon, which is that of the client, covers documents which came into existence for the purpose of obtaining professional advice from a solicitor as to how such a statute might be evaded. The defendant is not bound to produce any documents which he can shew not to be relevant to the issue as before stated, but with regard to such documents as he has to admit to be so relevant I do not think that he has made out any privilege. For these reasons I think that the appeal must be dismissed.

ROMER L.J. I agree. The rule of law with regard to the privilege from production of communications between solicitor and client is well settled. The privilege is not limited to communications passing between them with reference to litigation pending or contemplated, but extends to professional

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communications of a confidential character which take place for the purpose of procuring legal advice or assistance from the solicitor. It does not extend any further than that. The rule on the subject is referred to by Lindley L.J. in *O'Shea* v. *Wood* (1) as follows: "The law as to the privilege of communications between solicitor and client is now well understood, and is very clearly expressed in *Gardner* v. *Irvin*. (2) 'It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor; the letters must be professional communications of a confidential character for the purpose of getting legal advice.' Letters are not necessarily privileged because they pass between solicitor and client; in order to be privileged, there must be a professional element in the correspondence." The rule has been expressed in other words, but really to the same effect, in *Wheeler* v. *Le Marchant* (3) by Jessel M.R. He there said: "It must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently." The statement of the rule so made by Jessel M.R. really agrees with that cited by Lindley L.J. from *Gardner* v. *Irvin* (2), if a sufficiently wide interpretation is given to the words "rights of property" as used by the former. The reason why he used them is clear enough. He meant to express that it was no part of the professional duty of a solicitor to advise on questions of morality not connected with rights of property. The documents now in question would fall within the rule so stated but for another consideration which applies to them. It is clear that the claim of privilege is

(1) [1891] P. 286. (2) (1878) 4 Ex. D. 49.
(3) 17 Ch. D. 675.

unavailing in cases where fraud or illegality is alleged, and, the existence of that fraud or illegality being in issue, the documents are relevant to that issue. The only question of any difficulty which we have to consider appears to me to be whether that principle extends to a case like the present. With regard to that question, I have come to the same conclusion as my brother Collins L.J., namely, that that principle does apply, and that we ought to hold that documents for which privilege might otherwise be claimed, as coming within the rule which I have mentioned, ought to be produced, if they tend to support the allegation of the Crown that the conveyances in question were made with a view to evading the duty under the Act. Having regard to the terms of the Act, which bound the testator and imposed on him a duty and obligation to obey it, he would, in making a transfer of property with intent to evade its provisions, be doing what was rendered by it wrong and improper, and any documents which directly tend to support the allegation that he has made such a transfer, contrary to the provisions of the Act, ought to fall within the same rule as applies to the case of fraud or illegality. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for informant: *Freshfields & Williams.*

Solicitors for defendants: *Crowders, Vizard & Oldham, for Austin & Bath, Glastonbury.*

E. L.

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April 26, 27.

[IN THE COURT OF APPEAL.]

VIZETELLY *v.* MUDIE'S SELECT LIBRARY, LIMITED.

Libel—Publication—Circulating Library—Book circulated in Ignorance of Libel contained in it—Negligence.

The proprietors of a circulating library circulated copies of a book which, unknown to them, contained a libel on the plaintiff. In an action for libel brought against them by the plaintiff, they failed to shew that it was not through negligence on their part that they did not know that the book contained the libel when they circulated it:—

Held, that they were liable as publishers of the libel.

Emmens v. *Pottle*, (1885) 16 Q. B. D. 354, discussed.

Application for judgment or a new trial in an action tried before Grantham J. with a jury.

The action was for a libel contained in a book, copies of which had been circulated and sold by the defendants, who were the proprietors of a circulating library with a very extensive business. The defendants in their defence stated that, if they sold or lent the book in question, they did so without negligence, and in the ordinary course of their business as a large circulating library; that they did not know, nor ought they to have known, that it contained the libel complained of; that they did not know and had no ground for supposing that it was likely to contain libellous matter; and that under the circumstances so stated they contended that they did not publish the libel.

The plaintiff had been employed by Mr. Gordon Bennett of the *New York Herald* to proceed as the head of an expedition to Africa to search for Sir H. Stanley, who was then engaged in an expedition for the rescue of Emin Pasha, and to furnish news to the *New York Herald* on the subject. He met Stanley and Emin Pasha in Africa on their way down to the coast at a place called Msura; and subsequently sent off letters to Mr. Gordon Bennett. Messrs. Archibald Constable & Co., a well-known firm of publishers, in October, 1898, published in

this country a book called "Emin Pasha: his Life and Work," which was a slightly abridged English version of a work published in Germany that purported to be compiled from the journals, letters, and scientific notes of Emin Pasha and from official documents. It contained the following passage purporting to be an extract from Emin Pasha's diary: "Vizetelly sent off three messengers to-day to the coast, each with a bulky letter. However, as he is not yet sober, he cannot surely have written them himself, and the solution of the problem is, as Dr. Parke tells us, simply that Stanley had the correspondence ready, and knocked it down to the highest bidder, Vizetelly, that is, Gordon Bennett, and quite right too." This was the libel complained of. It was not suggested that the statements contained in it were true. The plaintiff on becoming aware of the libel brought an action for libel against Messrs. Constable & Co., which was settled by their paying 100*l.* damages, apologizing, and undertaking to withdraw the libel from circulation. In the issue of the *Publishers' Circular*, a recognised medium for trade advertisements of the kind, for November 12, 1898, a notice was inserted to the effect that Messrs. Archibald Constable & Co. requested that all copies of vol. i. of "The Life and Work of Emin Pasha" might be returned to them immediately, as they wished to cancel a page, and insert another one in its place, and stating that they would of course defray the carriage both ways, if desired. A similar notice was inserted on the same date in the *Athenæum* newspaper, a well-known medium of communication among literary people. In March, 1899, it came to the plaintiff's knowledge that the defendants were lending copies of the work as originally published to subscribers, and also selling surplus copies of the same, and he thereupon commenced the action against them. It appeared that none of those engaged in the conduct of the defendants' business had seen the before-mentioned notices in the *Publishers' Circular* and *Athenæum*, though the defendants took in those papers. Mr. A. O. Mudie, one of the defendants' two managing directors, who was called as a witness for the defendants, gave evidence to the effect that the defendants did not know when they circulated and sold the book in question

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that it contained the passage complained of. He stated that the books which they circulated were so numerous that it was impossible in the ordinary course of business to have them all read, and that they were guided in their selection of books by the reputation of the publishers, and the demand for the books. He said in cross-examination that there was no one else in the establishment besides himself and his co-director who exercised any kind of supervision over the books; that they did not keep a reader or anything of that sort; that they had had books on one or two occasions which contained libels; that that would occur from time to time; that they had had no action brought against them for libel before the present action; and that it was cheaper for them to run an occasional risk of an action than to have a reader. The learned judge in summing up in substance directed the jury to consider whether, having regard to the above-mentioned evidence, the defendants had used due care in the management of their business. The jury found a verdict for the plaintiff, damages 100*l*.

The defendants applied for judgment or a new trial on the ground that there was no evidence on which a verdict could be found or judgment entered for the plaintiff, and also on the grounds that the judge insufficiently directed the jury on the question what amounted in law to the publication of a libel, and on the question of the burden of proof as to publication and of the duty of the defendants and their alleged negligence, and that the verdict was against the weight of the evidence.

Asquith, *Q.C.*, and *Scrutton* (*McCall*, *Q.C.*, with them), for the defendants. It is not suggested that the defendants, when they circulated and sold copies of the work in question, knew that it contained a libel on the plaintiff. The question, therefore, is whether the proprietors of a library, such as the defendants', who in the ordinary course of business lend or sell a book which contains a libel, in ignorance that it contains a libel, can be said to publish the libel. The merely accidental circulation of a libel by the innocent transmission of a document containing it, as, for instance, by a carrier or messenger, does not amount to a publication of it. At any rate, it does

not amount to publication, unless it can reasonably be said that the person so transmitting the document ought to have known or suspected that it contained a libel. In such a case it cannot be said that there is any malicious publication, for the malice implied by law from the publication of a libel is negatived: see *Emmens* v. *Pottle*. (1) That case is an authority in favour of the defendants. There was no evidence here of any negligence on the part of the defendants in not knowing that the book in question contained a libel on the plaintiff. There was nothing in the title or general nature of the book, or the reputation of the author or publishers, to suggest that the book was likely to contain libellous statements. It is not reasonable to suggest that a proprietor of a circulating library or a bookseller must always have every book which he lends out or sells in the ordinary course of business read through from cover to cover, in order to see whether it contains a libel. It is impossible for persons carrying on a business like the defendants', in which thousands of new books are yearly taken, and many of them have to be procured and circulated immediately in response to the urgent demand for them by the public, to have each book examined minutely to see whether it contains a libel; and, if there is no special circumstance to put them on inquiry, they are entitled to assume that it does not. If the verdict of the jury is to be taken to import that they found negligence against the defendants in not having discovered that the book contained a libel on the plaintiff, the verdict was against the evidence. (2)

[They also cited *Reg.* v. *Munslow* (3); *Mallon* v. *W. H. Smith & Son*. (4)]

Cyril Dodd, Q.C., and *Bassett Hopkins*, for the plaintiff. The case of *Emmens* v. *Pottle* (1) introduced an exception from the general law on the subject which is not applicable to the present case. It is submitted that the result of the authorities

(1) 16 Q. B. D. 354.

(2) The argument with regard to misdirection, except so far as it involved the point here reported, is not given, as it turned on a minute criticism of particular statements made and expressions used by the judge in summing up which were alleged to have misled the jury but did not involve a question of general principle.

(3) [1895] 1 Q. B. 758.

(4) (1893) 9 Times L. R. 621.

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prior to that case clearly is to shew that the sale of a book containing a libel in the ordinary course of business would be a publication of the libel, although the vendor did not know that the book contained the libel: see *Rex* v. *Dodd*. (1) In the case of *Emmens* v. *Pottle* (2) the sale was of a newspaper. The case of a newspaper is peculiar in that the newsvendor must, as a matter of business, sell immediately, without any opportunity of perusal, a publication the interest of and demand for which is ephemeral. There is not the same urgency in regard to books, and there is consequently an opportunity for perusal. The effect of *Emmens* v. *Pottle* (2) was really to give to the vendors of newspapers a protection of a similar kind to that given to newspaper proprietors by statute: see *Reg.* v. *Holbrook*. (3) The decision in *Emmens* v. *Pottle* (2) turned entirely on the special findings of the jury, one of which was to the effect that it was not through the negligence of the defendants that they did not know that the newspaper contained a libel. There is no such finding in the present case; but, on the contrary, it must be taken that the jury found that under the circumstances there was negligence on the part of the defendants in not finding out that the book contained the libel, for the case was fought at the trial wholly on the issue whether there was such negligence: and there was evidence to support that finding. There was no misdirection on the part of the learned judge and the verdict was not against evidence.

[They also cited *Hebditch* v. *McIlwaine* (4); *Tompson* v. *Dashwood*. (5)]

Scrutton, in reply.

A. L. SMITH L.J. This is an application on behalf of the defendants to enter judgment for them or for a new trial on the ground that there was no evidence to support the verdict, and also on the grounds of misdirection and that the verdict was against the weight of the evidence. The judgment which I am about to give is based upon the special facts of the par-

(1) (Hilary, 10 Geo. 1) 2 Sess. Ca. 33.
(2) 16 Q. B. D. 354.
(3) (1878) 4 Q. B. D. 42.
(4) [1894] 2 Q. B. 54.
(5) (1883) 11 Q. B. D. 43.

ticular case, and I do not wish to be considered as laying down any general rule of law applicable to all circulating libraries. In this case I think that there were circumstances which justified the jury in saying that the defendants published the libel of which the plaintiff complains. The defendants having lent and sold copies of the book containing that libel, primâ facie they published it. What defence, then, have they? None, unless they can bring themselves within the doctrine of *Emmens* v. *Pottle*. (1) That was a case in which newsvendors had sold newspapers containing a libel on the plaintiff. The jury found (1.) that the defendants did not know that the newspapers at the time they sold them contained libels on the plaintiff; (2.) that it was not by negligence on the defendants' part that they did not know there was any libel in the newspapers; and (3.) that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so. The learned judge who tried the case on those findings ordered judgment to be entered for the defendants. The plaintiff appealed to this Court. Lord Esher M.R. in giving judgment dismissing the appeal said: "I agree that the defendants are primâ facie liable. They have handed to other people a newspaper in which there is a libel on the plaintiff. I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel. We must consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write it, or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they published the libel. If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have

(1) 16 Q. B. D. 354.

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been liable for so doing. That I think cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and still more, that they ought not to have known this, which must mean that they ought not to have known it, having used reasonable care—the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel." Applying the law so laid down to the present case, where is there any such finding here, as there was in *Emmens* v. *Pottle* (1), to the effect that it was not by negligence on the defendants' part that they did not know that there was a libel in the book which they disseminated? What are the special circumstances of this case with regard to the question whether the defendants took due and reasonable care in the conduct of their business in this respect? It appears from the evidence of Mr. Mudie, one of the defendants' directors, that there was no one in the establishment to exercise any supervision over the books besides himself and his co-director, and the books were too numerous for them to examine to see if they contained libels. He admitted that they had had books on one or two occasions which contained libels, but they had never before had an action brought against them for libel, and that they did not employ readers because it was cheaper for them to run the risk, i.e., of publishing libels and being sued for those libels, of having actions brought against them, than to do so. Is it surprising that, after admissions of this kind, a jury should come to the conclusion that the defendants did not exercise due care to see that the books circulated by them did not contain libels, and that they did not get from the jury findings such as those in *Emmens* v. *Pottle*? (1) It seems to me that

(1) 16 Q. B. D. 354.

out of the mouth of Mr. Mudie there was sufficient evidence to justify the jury in coming to the conclusion that the defendants had failed to prove their defence, and that it was through negligence on their part that they did not find out that the book contained a libel on the plaintiff. That being so, they failed to do what the defendants in *Emmens* v. *Pottle* (1) succeeded in doing, namely, prove that they did not publish the libel. Again, there was another matter for the consideration of the jury in connection with this question, namely, the notices published in the *Publishers' Circular* and the *Athenæum*. The former of these is a well-known trade organ in which notices of the kind are usually published. It appears that the defendants took it in, but it does not appear that any one on their behalf ever looked into it to see whether there was anything in it about this book. Might not a jury reasonably say that the defendants should have had some one whose duty it was to look into this circular to see whether it contained anything about the books which they circulated? The same consideration applies to the notice which appeared in the *Athenæum*. I think there was evidence for the jury of want of due care on the part of the defendants by reason of which they failed to find out that the book contained a libel, and I cannot say that their verdict was against the weight of the evidence. The defendants therefore failed to prove the plea which was proved in *Emmens* v. *Pottle* (1), namely, that they did not publish the libel. The summing-up and direction of the learned judge appear to me to be substantially in accordance with the law as laid down in that case, and I see no sufficient ground for saying that there was misdirection. For these reasons I think the application must be dismissed.

VAUGHAN WILLIAMS L.J. I agree. The verdict of the jury, as I understand it, amounts to a finding that the defendants failed in their judgment to prove that it was not by any negligence on their part that they did not know that the book in question contained a libel on the plaintiff. With regard to the contentions that the learned judge misdirected the jury, and

(1) 16 Q. B. D. 354.

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Vaughan Williams L.J.

that the verdict was against the weight of the evidence, I think that, taking the direction as a whole, it was properly based upon the law as laid down in *Emmens* v. *Pottle* (1), and that the verdict was not against the evidence. Under the circumstances of this case, therefore, and without saying anything as to the liabilities and position of persons who carry on the business of a circulating library generally, it appears to me that we ought not to interfere with the verdict in the present case. The case of *Emmens* v. *Pottle* (1) seems to me, when carefully read, to be in consonance with the whole history of the law of libel. The basis of the action for libel is that the defendant has falsely and maliciously (2) published defamatory matter concerning the plaintiff. It was long ago established that the fact of the publication of false and defamatory matter concerning a person was itself evidence of malice, and juries were accordingly directed that the falsity of the defamatory matter raised a presumption of malice in publishing it. That presumption cannot of course be rebutted merely by tendering evidence to shew that the defendant had not in fact any spiteful feeling in his mind, for a man must be taken to intend the natural consequences of his own act in publishing the libel. In some cases the presumption which I have mentioned may be rebutted by shewing that the defamatory statement was published by the defendant on a privileged occasion under a sense of duty. But that is not I think the only case in which the presumption may be rebutted. What I understand *Emmens* v. *Pottle* (1) really to decide is that the innocent publication of defamatory matter, i.e., its publication under such circumstances as rebut the presumption of any malice, is not a publication within the meaning of the law of libel. That seems to me to be good sense, but in the present case the defendants have failed to prove those facts which are necessary to negative the presumption of malice in publishing the libel and to shew that the publication of it by them was an innocent publication.

ROMER L.J. The law of libel is in some respects a very hard one. In the remarks which I am about to make I propose to

(1) 16 Q. B. D. 354.

(2) [See the opinion of Cave J. in *Allen* v. *Flood*, [1898] A. C. at p. 37.]

deal only with communications which are not privileged. For many years it has been well settled law that a man who publishes a libel is liable to an action, although he is really innocent in the matter, and guilty of no negligence. That rule has been so long established as to be incapable of being altered or modified, and the Courts, in endeavouring to mitigate the hardship resulting from it in many cases, have only been able to do so by holding that, under the circumstances of cases before them, there had been no publication of the libel by the defendant. The result, in my opinion, has been that the decisions on the subject have not been altogether logical or satisfactory on principle. The decisions in some of the earlier cases with which the Courts had to deal are easy to understand. Those were cases in which mere carriers of documents containing libels, who had nothing to do with and were ignorant of the contents of what they carried, have been held not to have published libels. Then we have the case of *Emmens* v. *Pottle* (1), in which vendors of newspapers in the ordinary course of their business sold a newspaper which contained a libel. It was clear that selling a document which contained a libel was primâ facie a publication of it, but the Court there held that there was no publication of the libel under the circumstances which appeared from the special findings of the jury, those findings being (1.) that the defendants did not know that the newspapers at the time they sold them contained libels on the plaintiff; (2.) that it was not by negligence on the defendants' part that they did not know that there was any libel in the newspapers; and (3) that the defendants did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought they to have known so. Lord Esher M.R. in this Court was of opinion that, though the vendors of the newspapers, when they sold them, were primâ facie publishers of the libel, yet, when the special findings of the jury were looked at, the result was that there was no publication of the libel by the defendants. Bowen L.J. put his judgment on the ground that the vendors of the newspapers in that case were really only in the same position as an ordinary

(1) 16 Q. B. D. 354.

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carrier of a work containing a libel. The decision in that case, in my opinion, worked substantial justice; but, speaking for myself, I cannot say that the way in which that result was arrived at appears to me altogether satisfactory; I do not think that the judgments very clearly indicate on what principle Courts ought to act in dealing with similar cases in future. That case was followed by other cases, more or less similar to it, namely, *Ridgway* v. *Smith & Son* (1), *Mallon* v. *W. H. Smith & Son* (2), and *Martin* v. *Trustees of the British Museum*. (3) The result of the cases is I think that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken, what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered. If he did it in the ordinary way of his business, the nature of the business and the way in which it was conducted must be looked at; and, if he succeeds in shewing (1.) that he was innocent of any knowledge of the libel contained in the work disseminated by him, (2.) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel, and (3.) that, when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel, then, although the dissemination of the work by him was primâ facie publication of it, he may nevertheless, on proof of the before-mentioned facts, be held not to have published it. But the onus of proving such facts lies on him, and the question of publication or non-publication is in such a case one for the jury. Applying this view of the law to the present case, it appears to me that the jury, looking at all the circumstances of the case, have in effect found that the defendants published the libel complained of, and therefore the defendants are liable, unless that verdict is disturbed. Looking at the special circumstances of the case which were brought to the

(1) (1890) 6 Times L. R. 275. (2) 9 Times L. R. 621.
(3) (1894) 10 Times L. R. 338.

attention of the jury, I cannot say that they could not reasonably find as they did. The only remaining question is whether the summing-up and direction of the learned judge were such as would justify us in sending down the case for a new trial. I find no misdirection in point of law, and though, with great respect to the learned judge, I do not think that all he said was correct, or justified by the evidence, the jury had the facts fully put before them, and on the whole I do not think that there was anything in the summing-up which caused the jury to come to an erroneous conclusion, or which would justify us in granting a new trial. For these reasons I think the application must be dismissed.

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Application dismissed.

Solicitors for plaintiff: *Noon & Clarke.*
Solicitors for defendants: *Clapham, Fitch & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A. 1900 *April* 9.

RENTON GIBBS & CO., LIMITED *v.* NEVILLE & CO.

Practice—Pleading—Counter-claim in reply—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-ss.* 3, 7—*Order* XIX., *r.* 3; *Order* XXI., *rr.* 10–17.

In an action for the price of goods supplied, the defendants counter-claimed for damages for breach by the plaintiffs of a contract. The plaintiffs in their reply denied that the contract was binding on them, and further alleged that, if it was binding, the defendants had committed breaches of it which caused them loss, and they counter-claimed to set off the loss so sustained against the defendants' counter-claim. Upon an application to strike out the counter-claim in the reply:—

Held, that as the plaintiffs did not rely upon the counter-claim in the reply as an independent claim, but merely as a protection against the defendants' counter-claim, the counter-claim was properly raised in the reply and ought not to be struck out.

Toke v. *Andrews*, (1882) 8 Q. B. D. 428, approved.

APPEAL from an order of Phillimore J. at chambers reversing an order of the Liverpool district registrar.

The action was brought on July 24, 1899, by the plaintiffs,

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who carried on business as hot-water engineers at Liverpool, to recover 650*l.* 8*s.* 1*d.*, being the balance of an account for work done for and materials supplied to the defendants.

The defendants in their statement of defence admitted that there was due from them to the plaintiffs a sum of 113*l.* 19*s.* 5*d.*, and subject to the counter-claim they admitted liability for that amount. By way of counter-claim, they alleged that prior to the month of August, 1892, the business carried on by the plaintiffs was carried on by Robert Renton Gibbs under the style of Renton Gibbs; that by an agreement in writing dated June 20, 1892, between the defendants, who carried on business as general merchants at Liverpool and in Spain, and Gibbs it was provided that during the period of twelve years from the date thereof Gibbs should not manufacture, erect, or supply any heating apparatus for or to any person in Spain other than the defendants or persons designated by them (with certain exceptions), and should not, directly or indirectly, canvass or solicit orders for any heating apparatus in Spain; that in August, 1892 (the date of the incorporation of the plaintiff company), the plaintiffs acquired the business theretofore carried on by Gibbs by an agreement in writing, by the terms of which they took over the liability of Gibbs under the agreement of June 20, 1892, and the defendants assented thereto. The defendants claimed 3000*l.* damages by reason of the plaintiffs having, in breach of the agreement, canvassed and solicited orders in Spain and sold heating apparatus to customers there.

The plaintiffs in their reply joined issue as to the defence, and as to the counter-claim they pleaded that the agreement of June 20, 1892, was not nor was the liability of Gibbs thereunder ever taken over or adopted by them, nor were they ever bound thereby. They further pleaded, in paragraph 13 of the reply: "The defendants, from August, 1892, to the year 1898, acted as the plaintiffs' agents in Spain for the sale of and to obtain orders for the installation of heating apparatus, and during such period, in breach of their duty towards and of their implied promise to the plaintiffs as such agents and without the knowledge of the plaintiffs, added unreasonable and

excessive amounts by way of commission or remuneration for themselves to the plaintiffs' estimates before submitting the same to the intending customers, and thereby caused the plaintiffs to lose orders and suffer loss, which loss the plaintiffs claim to set off against the counter-claims of the defendants (if any) herein. In the alternative, if the said alleged agreement of June 20, 1892, was ever binding upon the plaintiffs (which is denied), then, in breach of their duty towards and of their implied promise to the plaintiffs arising thereunder and from the mutual relationship thereby established and without the knowledge of the plaintiffs, the defendants added unreasonable and excessive amounts by way of commission or remuneration for themselves to the plaintiffs' estimates before submitting the same to the intending customers, and thereby caused the plaintiffs to lose orders and suffer loss, which loss the plaintiffs claim to set off against the counter-claims of the defendants (if any) herein."

The district registrar, upon the application of the defendants, struck out paragraph 13 of the reply. Phillimore J. set aside the order of the registrar.

The defendants appealed.

Leslie Scott, for the defendants. The learned judge was wrong in allowing the plaintiffs to counter-claim in their reply. Sect. 24, sub-s. 3, of the Judicature Act, 1873, which allows a counter-claim, expressly limits the right to a defendant. This is a new right given by statute, and the rules cannot extend the right. The rules, however, when examined, do not profess to extend it. They all point to the defendant as the only person who can counter-claim. There is no provision enabling a plaintiff to counter-claim in his reply. Order XIX., r. 3, and Order XXI., rr. 10–17, which prescribe the procedure to be followed, all speak of a defendant counter-claiming. This Court has held in *Alcoy and Gandia Railway and Harbour Co.* v. *Greenhill* (1), following the decision in *Street* v. *Gover* (2), that the word "reply" in Order XXI., r. 14, does not include a counter-claim, and that, therefore, a person not a party to the

(1) [1896] 1 Ch. 19. (2) (1877) 2 Q. B. D. 498.

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action, who is brought in as a defendant to a counter-claim, cannot himself counter-claim. Order XXIII., r. 4, puts a reply to a counter-claim in the same position as a statement of defence; it does not say that the plaintiff can counter-claim in his reply. A counter-claim is in reality a cross-action, and is so treated upon the taxation of costs. By Order XIX., r. 17, a defendant must plead specifically to the claim; and yet, if a plaintiff can counter-claim, the defendant, by Order XXIII., r. 2, will have no right to answer it except by leave of the Court, because that rule prohibits any pleading beyond a reply except by leave. That shews that the intention was to limit the right to counter-claim to a defendant. The proper course for the plaintiff to adopt is to amend his statement of claim. To allow a new claim to be brought forward in the reply would be to transgress the provisions of Order XIX., r. 16. In *Toke* v. *Andrews* (1) the plaintiff was allowed to counter-claim in his reply in respect of a cause of action that accrued after the issue of the writ. There the claim that the plaintiff sought to set up was for a liquidated sum, and was in the nature of a set-off, and was not, as in the present case, a claim for unliquidated damages. In that case the Court said (2) that, if the matter had arisen before action, the plaintiff might have been properly told to amend his statement of claim; and in *James* v. *Page* (3) it was held that, if a new ground of claim arose which existed before the issue of the writ, the statement of claim must be amended. The Court there struck out a counter-claim set up by the plaintiff in his reply in answer to the defendant's counter-claim. That case is precisely in point. *Toke* v. *Andrews* (1) is an exceptional case, and ought not to be extended. If necessary, that case ought to be overruled. The plaintiffs' counter-claim ought, therefore, to be struck out.

W. D. MacConkey, for the plaintiffs, was not called upon.

COLLINS L.J. I am of opinion that this appeal should be dismissed. The plaintiffs, a limited company, claim for a balance of money due to them for work done for and mate-

(1) 8 Q. B. D. 428. (2) 8 Q. B. D. at p. 432.
(3) (1888) 85 L. T. (Jo.) 157.

rials supplied to the defendants. The defendants admit that something is due, and they counter-claim on an agreement made by them with Robert Renton Gibbs before the company was formed, alleging that the agreement was adopted by the company, and they set up a claim for damages for breach of the agreement. The plaintiffs deny that they ever came within the obligations and rights arising under the contract, and they further say in effect that if the contract is found to be binding on them they have a counter-claim for unliquidated damages against the defendants arising out of the contract, and that to the extent of the damages that they would recover they are entitled to set them off against anything the defendants might recover under their counter-claim. It has been argued that a counter-claim cannot be set up by a plaintiff in his reply, and that the rules do not contemplate such a case. In support of that view reference is made to *James* v. *Page* (1), a case only noticed in the *Law Times*. An incidental observation on that case is that what was there set up was a counter-claim properly so called—a counter-claim used not as a shield but as a sword. It is contended on behalf of the defendants that the plaintiffs must submit to have their counter-claim struck out, and that their proper course is to introduce the subject-matter of their counter-claim into the statement of claim as an alternative original cause of action. It is clear that it would be inequitable to allow the defendants to have the benefit of their counter-claim free altogether from the matters raised in the reply. The question is whether the rules are so framed as to necessitate the putting of the parties to the unnecessary expense of beginning the pleadings de novo. What would be the result if they had to do this? The plaintiffs do not want to rely on the contract upon which the defendants base their counter-claim, and indeed they deny that it is binding on them. If they are bound to deal with the contract in their statement of claim, they would be embarrassed by having to set up a cause of action, whose existence they deny, inconsistent with and hampering their real cause of action. In that state of circumstances it would be an obvious injustice to the plaintiffs to

(1) 85 L. T. (Jo.) 157.

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oblige them to introduce this question under the contract into the statement of claim by an amendment. The natural place for it is in the reply in which it is now found. In this way the plaintiffs, in dealing with the counter-claim under the contract, can deny their liability on the ground that the contract is not binding on them, and can add that, if they are liable, then and only then do they claim to shield themselves from the result of that liability by claiming unliquidated damages from the defendants arising out of an alleged breach of the contract by them. I do not think that we are prevented from allowing the plaintiffs so to shape their case. *Toke* v. *Andrews* (1) establishes a principle which abundantly justifies us in affirming the decision of the learned judge. In that case the action was brought for rent in arrear. Before delivery of a statement of defence the tenancy was determined, and thereupon a claim arose to the defendant as outgoing tenant, and another quarter's rent became due to the plaintiff. In answer to the claim in the action the defendant set up a counter-claim on an outgoing valuation to a larger amount than the rent claimed. To that counter-claim the plaintiff in his reply set up a counter-claim for the further quarter's rent accrued since the action commenced. There was no machinery in that case any more than there is in this for effecting that under the rules; but Field J. and Huddleston B. held that it would be an injustice to the plaintiff if he were obliged to submit to the counter-claim overtopping the amount claimed in his statement of claim. It was held that, looking at the wide language of sub-s. 3, s. 24, of the Judicature Act, 1873, and sub-s. 7 of the same section, it was impossible to say that a matter upon which, if well founded, the plaintiff was clearly entitled to relief as against the defendant's counter-claim was not within the words and the spirit of the enactment, or to hold that such a matter was not properly brought forward at the only stage and in the only manner in which it could be raised. That is practically the state of affairs in the case before us, because it would be unjust to the plaintiffs to make them set up as a claim that which they only want as a defence and a shield to the counter-claim. In my opinion

(1) 8 Q. B. D. 428.

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the order of Phillimore J. was right, and the appeal must be dismissed.

ROMER L.J. I agree. If a plaintiff when he sees a counter-claim finds that he has omitted to raise a claim in addition to that already raised in the statement of claim, he ought, as a rule, to raise that claim by amendment of his statement of claim. That is the regular course, and that is what was directed to be done in the case of *James* v. *Page* (1) before Manisty and Stephen JJ. To this rule there are exceptions. If on looking at the nature of the additional claim which the plaintiff wants to set up it appears to be one that cannot be added to the original statement of claim without inflicting hardship and injustice on the plaintiff, and further that it would be an injustice not to allow him to set it up, the Court has jurisdiction to allow him to set it up in his reply. That principle was laid down in *Toke* v. *Andrews* (2), a decision that was given in 1882, and has not been impugned up to the present time, and a decision which in my opinion did a great deal of good and ought to be upheld. In this case it is impossible to require the plaintiffs to amend their statement of claim and begin all over again, and it would be an injustice not to allow them to set up the claim as an answer to the counter-claim. I think that the Court ought in the circumstances of this case to allow the plaintiffs to set up their claim for breach of the contract in answer to the defendants' counter-claim founded on that contract, and to do this in the only way practically open to them, namely, by a counter-claim in reply to the counter-claim of the defendants.

Appeal dismissed.

Solicitors for plaintiffs: *Lydall & Sons, for T. & T. Martin, Webb & Martin, Liverpool.*

Solicitors for defendants: *Field, Roscoe & Co., for Alsop, Stevens, Harvey & Crooks, Liverpool.*

(1) 85 L. T. (Jo.) 157. (2) 8 Q. B. D. 428.

A. M.

1900
April 9.

SIMMONDS BROTHERS, LIMITED, AND OTHERS, APPELLANTS; THE VESTRY OF THE PARISH OF FULHAM, RESPONDENTS.

Metropolis—Management Acts—"New Street"—Paving—Expenses—Liability of Frontagers—Lapse of Time since Road became New Street—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 105.

In 1883 a highway, the greater part of which was then paved, became a "new street" within the meaning of s. 105 of the Metropolis Management Act, 1855, which enables a metropolitan vestry or district board to pave any "new street" not paved to their satisfaction, and to charge the expense on the owners of the houses forming the street. From 1883 to 1899 the district board, and the vestry who succeeded them, repaired the footways and carriageway of the street as surveyors of highways. In 1899 the vestry resolved to exercise their powers under s. 105, and required the owners to pay the apportioned expenses of paving the street :—

Held, distinguishing *Bonella* v. *Twickenham Local Board*, (1887) 20 Q. B. D. 63, that, as neither the board nor the vestry had exercised their powers under s. 105 before 1899, the vestry were then entitled to exercise them, notwithstanding the time which had elapsed since the road became a new street.

A road may become a "new street" within s. 105 of the Metropolis Management Act, 1855, although all the land on one side of it is building land upon which no building has been erected.

CASE stated, under the Summary Jurisdiction Acts, by one of the metropolitan police magistrates sitting at the West London Police Court.

In November, 1899, the respondents, who are the vestry of the parish of Fulham, preferred a complaint before the magistrate to obtain payment from the appellants of various sums of money, being their proportionate shares of the estimated expenses of paving a portion of Fulham Palace Road, an apportionment having been made upon the appellants in respect of twenty-two houses in that road.

The case stated the following material facts :—

The appellants were the owners, within the meaning of the Metropolis Management Acts, of the twenty-two houses in question, which were situated in and adjoined a portion of the Fulham Palace Road, about 616 yards in length, called in the

case " Section Three." The Fulham Palace Road was a turnpike road at the date of the passing of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120). On the expiration of the Turnpike Act in 1864, the road became a highway repairable by the inhabitants at large, and was repaired as such from time to time by the Fulham District Board, in whose district it then was, and by the respondents after the dissolution of the board.

In 1864 Section Three, with the exception of one house standing on the eastern side thereof, ran wholly between market gardens. By the latter part of 1883, however, the eastern side had been covered with houses along its entire length, nearly all of those houses having been built in the period between the middle of 1881 and the middle of 1883.

The whole of the land adjoining the western side of Section Three is vacant building land, without any building thereon except a temporary iron building used as a board school.

In 1879 the footpath on the eastern side of Section Three, for a distance of about 260 yards adjoining the respondents' and other buildings, was paved by the Fulham District Board at the cost of their district, and the work was described in their books as " permanent works."

With that exception, and with the exception of a length of about 110 yards which had been partly paved and partly gravelled by the adjoining owners, the whole of the footpath on the eastern side was paved by the adjoining owners not later than the year 1883, and the whole footpath has ever since been kept up by the board and the vestry respectively in the same condition.

The whole of the footpath on the western side of Section Three was gravelled and stone-dotted by the Fulham Board at the cost of their district.

From and after March 25, 1886, the Fulham Board was dissolved by virtue of the Metropolis Management Act, 1855, and the respondents have since had all such powers, and been subject to all such provisions as if they had been named in Sched. A, Part II. of that Act.

Prior to 1896 Section Three had been from time to time

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widened on the eastern side at various points, partly by the owners and partly by the respondents under an arrangement with the owners; and in 1896 the remainder thereof, including the portion adjoining some of the appellants' houses, was widened by the respondents in like manner, and the paving and kerbing of the footpath thereof were relaid by the respondents at the cost of the parish. The strip of land required for widening the road opposite the appellants' houses was sold and conveyed by them to the respondents.

In October, 1898, by agreement between the respondents and the owners of the land on the western side of Section Three, the road was further widened by those owners by throwing into it a strip of ground about 13 feet wide, and the fences on that side were set back accordingly.

The carriageway of Section Three has, at all times material to the case, been of granite macadam. In 1883 it was similar to the carriageway of main roads as maintained usually by the Fulham District Board. It was and has been from time to time repaired by the Fulham District Board and the respondents by picking the surface and laying fresh macadam; but the foundation of it was not originally laid, and was never opened up or relaid, by either of them.

In March, 1899, the respondents, being dissatisfied with the paving of Section Three, resolved that it should be taken to and paved as a "new street" under the provisions of the Metropolis Management Act, 1855 (1), as amended by the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102).

(1) 18 & 19 Vict. c. 120, s. 105: "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriageway and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor, for the time being, of

The appellants refused, on demand, to pay the amounts apportioned upon them in respect of their twenty-two houses as being their share of the estimated expenses of paving Section Three.

At the hearing of the complaint, the appellants objected that Section Three of Fulham Palace Road had not, within the meaning of the Metropolis Management Acts, become a "new street" when the proceedings against them were taken, because the premises adjoining the western side of the road consisted of vacant building land on which there were no permanent buildings; also, that if it had become a "new street" it became so in 1883, and that, inasmuch as the greater part of it, including the portion adjoining the appellants' houses, had been paved before and was so paved when it became a new street, and the respondents did not within a reasonable time thereafter cause the same to be repaved, they must, having regard to the principle laid down in *Bonella* v. *Twickenham Local Board* (1), be deemed to have been satisfied with the existing paving, and could not afterwards take these proceedings against the appellants.

The magistrate was of opinion that the erection of buildings on one side only of Section Three, Fulham Palace Road, was sufficient to render the same a street within the meaning of the Metropolis Management Acts. He accordingly found that, by the erection of the buildings on the eastern side, Section Three became a new street in 1883, and still remained a new street when the respondents passed the resolution that it should be paved in 1899. He found as facts—that all the works done to the carriageway of Section Three by the

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the vestry or board); and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses."

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respondents previous to the passing thereof in 1899, and also all works done by them on the footway on the western side up to the present time, were temporary repairs done by them from time to time as surveyors of highways:

That with the exception of the before-mentioned 260 yards of paving done by the respondents in 1879 at the expense of the ratepayers, which paving he found to have been of a permanent character, all the works done by the respondents up to the present time (other than those done by them on behalf of the adjoining owners) on the footway on the eastern side were temporary repairs done by them as surveyors of highways:

That none of the works done by the respondents to the carriageway previous to 1899, and none of the works done by them on the footways up to the present time, were intended by them as an exercise of, nor (if that was a question of fact for the magistrate) did they thereby exercise, their powers under s. 105 of the Metropolis Management Act, 1855, and s. 77 of the Metropolis Management Act, 1862.

He was of opinion, further, that the permanent paving having been done several years before Section Three became a new street, the respondents' subsequently accrued rights under the above statutes could not thereby be affected, and that the principle laid down in *Bonella* v. *Twickenham Local Board* (1) did not apply to the exercise of the powers given to the respondents by ss. 105 and 77 of the Metropolis Management Acts, 1855 and 1862, respectively.

He therefore ordered the appellants to pay to the respondents the apportioned sums.

The question for the opinion of the Court was, in substance, whether the magistrate's decision was right in law.

Alexander Glen, for the appellants. There was no evidence upon which the magistrate could properly find that this was a new street. A road cannot become a new street where the land on one side of it is unbuilt upon though capable of being built upon. It may be a new street where the land on one

(1) 20 Q. B. D. 63.

side of it cannot be built upon, as in the instances of the Thames Embankment and Park Lane in London. It must substantially and practically be a house-built street. In *Robinson* v. *Local Board of Barton Eccles* (1) Lord Selborne L.C. said (2): "In the natural and popular sense of the word 'street,' or the words 'new street,' I should certainly understand a roadway with buildings on each side." That dictum was cited with approval in *Vestry of St. Giles, Camberwell* v. *Crystal Palace Co.* (3) and *Allen* v. *Vestry of Fulham.* (4) Those authorities, and the case of *Vestry of St. Mary, Battersea* v. *Palmer* (5), shew that, in order to constitute a road a "new street" within s. 105 of the Metropolis Management Act, 1855, it must be or have become a new street in the popular sense—it must be substantially or practically house-built. The definition of "street" in s. 250 of the Act of 1855, and of "new street" in s. 112 of the Metropolis Management Act, 1862, respectively do not preclude that popular sense from being applied to the expression "new street" in s. 105 of the former Act: *Arter* v. *Vestry of Hammersmith.* (6)

Secondly, the magistrate has found that Section Three of Fulham Palace Road became a new street in 1883. The street, with the existing paving of it, then vested in the local authority under s. 96 of the Act of 1855, and the owners then became liable to pave it should the local authority require them so to do. The local authority had an option to pave at the expense of the district under s. 98, or at the expense of the owners under s. 105. They must exercise their option to pave at the expense of the owners within a reasonable time. Having allowed sixteen years to elapse, they must be taken to have been satisfied with the paving as it existed when they took over the road, and they cannot now throw the expense of paving on the owners. The principle of *Bonella* v. *Twickenham Local Board* (7) and *Vestry of St. Giles, Camberwell* v. *Hunt* (8) applies to the present case.

(1) (1883) 8 App. Cas. 798.
(2) 8 App. Cas. at p. 801.
(3) [1892] 2 Q. B. 33.
(4) (1899) 63 J. P. 212.
(5) [1897] 1 Q. B. 220.
(6) [1897] 1 Q. B. 646.
(7) 20 Q. B. D. 63.
(8) (1887) 52 J. P. 132.

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Thirdly, the strip added by the owners on the western side of the road is in itself a new street, and the owners on the eastern side cannot be compelled to contribute to the expense of paving it: *Richards* v. *Kessick* (1); *White* v. *Vestry of Fulham*. (2)

Asquith, Q.C. (*Macaskie* with him), for the respondents. The magistrate's decision was right. Whether a street is, or has become, a new street is a question of fact for him to decide, and there was evidence here to support his finding.

[THE COURT intimated that they were satisfied upon this point.]

The doctrine of *Bonella* v. *Twickenham Local Board* (3) has never been applied in cases like the present. The decision there was under the Public Health Act, 1875 (38 & 39 Vict. c. 55), with respect to a sewer which was, when it became vested in the local board, proper and sufficient for draining the houses in the street and accepted as such by the local board, who were thenceforth bound to keep and maintain it. The language of s. 105 of the Metropolis Management Act, 1855, does not support the contention that the local authority are bound to exercise their discretion with respect to paving "new streets" within any time. A wide discretion is given; they can pave at the owner's expense whenever they "deem it necessary or expedient" that the street should be paved, and whether it has become "necessary or expedient" is a question wholly for them, and not for the magistrate, to decide: *Vestry of Chelsea* v. *Evans*. (4) It is clear that they can only exercise their powers under the statute once; but it is also clear from the magistrate's findings that they never have exercised their powers with respect to the road in the present case. In *Vestry of St. Giles, Camberwell* v. *Hunt* (5) it was found that the vestry had exercised their powers under s. 105. As Fry L.J. pointed out in *Vestry of St. Giles, Camberwell* v. *Crystal Palace Co.* (6), if the street became a new street it

(1) (1888) 57 L. J. (M.C.) 48; 59 L. T. 318.
(2) (1896) 74 L. T. 425.
(3) 20 Q. B. D. 63.
(4) (1870) 35 J. P. 23.
(5) 52 J. P. 132.
(6) [1892] 2 Q. B. 33, at p. 42.

remained a new street until the vestry exercised their power under s. 105. The intention of the Act obviously is that, where a new street is made for the purposes and profit of the owners, the vestry should be entitled to pave it at the expense of the owners when they deem it necessary and expedient, having regard to the traffic brought or likely to be brought over the street.

Alexander Glen replied.

RIDLEY J. We neither of us entertain any doubt upon this case. As to the first point raised, it would perhaps be sufficient to say that, the magistrate having found as a fact that the road in question became a new street in 1883, his decision in that respect should not be interfered with. I think, however, that it did become a "new street" within the ordinary acceptation of the term; and, speaking for myself, I do not accept Mr. Glen's argument that because the houses which have become continuous are on one side of the road, and on one side only, the road in such a case as the present could not become a new street. I agree with him that there is a difference between such a place as this, where the ground upon the other side of the road being in the hands of private owners might be built upon, and places such as Hyde Park or the Green Park, where the ground on the other side of the road cannot be built upon; but his argument has not convinced me that a road like the one in question in this case may not become a street although it has houses on one side only. I think it may. It is certainly more convenient, having regard to the district in which the road is, to hold that it does become a street, because there is a street at each end of it. It is a street which is no doubt being built upon unevenly, but I think it is a new street, and was properly so found by the magistrate.

As to the second point, I think this case is distinguishable from *Bonella* v. *Twickenham Local Board of Health*. (1) In that case, which was decided under s. 150 of the Public Health Act, 1875, the state of things was very different. There are, of

(1) 20 Q. B. D. 63.

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course, points of resemblance between the provisions in the two Acts. By s. 96 of the Act of 1855 streets being highways are vested in the vestry or district board in a similar way to that in which sewers are vested in the local authority by the provisions of the Public Health Act, 1875, and each Act contains a similar power for the authority to deal with the street in the one case, and with the sewer in the other, if they do not find it to their satisfaction. But there the resemblance seems to stop. In *Bonella* v. *Twickenham Local Board of Health* (1) the owners had made a sewer which had been found to be satisfactory and sufficient for the purposes of the street until the general system of sewerage was altered, and it became necessary to make a new sewer, as part of the new system, with levels laid the other way. Thereupon the local authority called upon the owners under s. 150 of the Public Health Act, 1875, to pay the expenses of the new sewer upon the ground that the street was not sewered to the satisfaction of the local authority, and took proceedings to compel the owners to do so. The Court held that this could not be done, because the local authority had accepted the old sewer as satisfactory at the time when it vested in them, and had dealt with it as being satisfactory for more than a reasonable time after it had vested in them. One would be very loth to quarrel with that decision even if one had the power. The reasoning upon which it was founded is almost precisely the same as the reasoning which governed the decision in *Fulham Board* v. *Goodwin*. (2) There, too, the sewer had been made by the owners, and the Court held that they could not be called upon to make another and a different sewer because circumstances had arisen since which made the first sewer unsatisfactory. But here the facts found by the magistrate shew clearly that the respondents have done nothing to the new street in exercise of their powers with respect to new streets contained in the Act; nor have they accepted or received anything done by the owners in that respect. The respondents received the roadway as it was before it became a new street,

(1) 20 Q. B. D. 63.

(2) (1876) 1 Ex. D. 400.

and did not deal with it as the roadway of a new street. Under those circumstances, which are entirely different from the circumstances of the case of *Bonella* v. *Twickenham Local Board* (1), are we to say that by reason of the fact that sixteen years have elapsed since the street became vested in them the respondents have lost the right to call upon the owners to make the street and do the paving under s. 105 of the Metropolis Management Act, 1855? The street is still a "new street" within the meaning of that expression as used in the Act of Parliament. Why should the lapse of time in such a case have the effect it has when a sewer made by the owners has been accepted and held satisfactory by the local authority during the period of time which has elapsed? I cannot see how the argument in the case of the sewer applies here at all. If we were to say that it did, the result would amount to this—that because at one time there was little or no traffic so that the roadway was in a sufficiently satisfactory condition, the increase of traffic is to make no difference. But surely it does make all the difference. The provisions of the Act, as I read it, were intended to ensure that if at any time the authority should find that a new street, which had become vested in them and had never been made or paved by them at all, was not sufficient for the traffic, that authority should have power to call upon the owners to make it so once and for all. I do not suggest that the authority can so call upon the owners twice; but they have power to do it once. To hold otherwise would be to say that a man who hangs back and will not have anything done to the road can escape having anything done at his expense. Those who live in a district which is becoming populous and calling traffic into it ought to pay in the first instance for the making of a road which will be sufficient. After doing that they cannot be called upon to pay again. If we held otherwise we should, in my opinion, be giving a mischievous interpretation to the Act of Parliament. I am quite clear that this case is outside the decision in *Bonella* v. *Twickenham Local Board*. (1) I accept the reasoning of the learned magistrate, and I think

(1) 20 Q. B. D. 63.

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that he came to a right conclusion. Our judgment must, therefore, be for the respondents.

DARLING J. I am of the same opinion.

Judgment for the respondents.

Solicitors for appellants: *Watson, Sons & Room.*
Solicitor for respondents: *T. Blanco White.*

W. A.

C. A.

1900

April 30.

[IN THE COURT OF APPEAL.]

ROBERTSON *v.* MAYOR, ALDERMEN, AND BURGESSES OF THE CITY AND COUNTY OF BRISTOL.

Local Government—Streets—Paving Expenses—Alteration of Width of Carriageway and Footway—Power of Urban Authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

An urban authority, when paving and making good a street, not being a highway repairable by the inhabitants at large, under s. 150 of the Public Health Act, 1875, has no power to alter the respective widths of the carriageway and footway of the street.

APPEAL from the judgment of Grantham J. in favour of the defendants at the trial of the action without a jury.

The action was brought for an injunction to restrain the defendants from disturbing, interfering with, or altering the position and measurement of the carriageway and footways in a street called Robertson Road.

In 1890 the plaintiff laid out certain land, of which he was the owner, for building purposes. The land was situate in the parish of St. George, within the district of the St. George's Local Board. In accordance with the by-laws of the local board, made under s. 157 of the Public Health Act, 1875, the plaintiff deposited with the local board plans which shewed an intended street called Robertson Road. The by-laws required that a person laying out a new street intended for use as a carriage-

road should lay it out so that the street should be 36 feet in width at the least, the carriageway being 24 feet wide at the least, and there being a footway on each side of a width not less than one-sixth of the entire width of the street. The plans shewed that Robertson Road was, along part of its length, of a total width of 45 feet, the carriageway being 30 feet wide and the footway on each side being 7 ft. 6 in. wide, and along the rest of its length of a total width of 40 feet, the carriageway being 27 feet wide and the footway on each side being 6 ft. 6 in. wide. The plans were approved by the local board in 1891 and 1892. The plaintiff thereupon proceeded to lay out Robertson Road in accordance with the plans, and when completed it was certified by the surveyor to the local board as laid out and formed to his satisfaction.

On November 1, 1897, by the Bristol Corporation Act, 1897 (60 & 61 Vict. c. ccxxx.), the boundaries of the city of Bristol were extended so as to comprise the parish of St. George, and the St. George's Urban District Council, who were the successors of the St. George's Local Board, was dissolved and its by-laws were annulled; and from that date all the property, rights, privileges, powers, duties, and liabilities of the St. George's Urban District Council were vested in the defendants. At that time houses had been built along Robertson Road, but the road had not then been taken over by the local authority as a highway repairable by the inhabitants at large.

In May, 1898, the defendants, as the urban sanitary authority, served notices upon the frontagers under s. 150 of the Public Health Act, 1875, requiring them to sewer, level, pave, and make good Robertson Road in accordance with certain plans, which shewed that part of the footway on each side of the street was to be thrown into the carriageway, so as to make each of the footways of a uniform width of 6 feet. The defendants' by-laws, while requiring new streets to be at least 30 feet wide, left it to the defendants to determine in each case what proportions should be laid out as carriageway and footway respectively. The notices not having been complied with, the defendants commenced to execute the works specified in the notices, when the plaintiff, as the owner of the soil of the street,

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brought this action for an injunction as above, contending that the defendants had no power under s. 150 of the Public Health Act, 1875, to alter the widths of the carriageway and footways. Grantham J. held that the defendants had power under s. 150 to deal with the street as they thought best for the public interest as regards both the carriageway and footways. He accordingly gave judgment for the defendants. The plaintiff appealed.

J. A. Foote, Q.C. (*Duke, Q.C.*, and *F. E. Weatherly* with him), for the plaintiff. The defendants have no power under s. 150 of the Public Health Act, 1875, to throw part of the footway into the carriageway. If the owner of the soil dedicates part of the street as carriageway and part as footway, the local authority cannot, under s. 150, alter the respective portions of the street so dedicated. They can only serve notices upon the frontagers to pave and make good the street as it then exists, and upon non-compliance by the frontagers they may execute the works themselves. They cannot call upon the frontagers to pave and make good a street different from that which then exists. They cannot alter or enlarge the dedication by converting part of the footway into the carriageway; they must accept the street as dedicated to the public: *Fisher* v. *Prowse*. (1) The word "pave" in s. 150 gives the local authority no power to alter the respective widths of the carriageway and footway. If the defendants' contention is correct, they might abolish the footpaths altogether, because their by-laws do not require them to have any footpaths at all. It may be that after the local authority have taken over the street and it has become vested in them under s. 149 of the Public Health Act, 1875, they can alter the respective widths of the carriageway and footway, subject to the liability to pay compensation under s. 308 in case any person sustains damage therefrom. The learned judge was therefore wrong. [He referred also to s. 4 of the Public Health Act, 1875.]

Joseph Walton, Q.C., and *Clavell Salter*, for the defendants. Sect. 150 of the Public Health Act, 1875, applies to streets

(1) (1862) 2 B. & S. 770.

which are in all respects private, and over which the public have no right: per Jessel M.R. in *Taylor* v. *Oldham Corporation*. (1) A private road might have been made without a footpath before any houses were built along it. After the erection of houses along it, the local authority must have power under s. 150 to serve notices on the frontagers requiring them to pave and make good the street partly as carriageway and partly as footway. That would be a reasonable mode of "paving" the street. It would be an unreasonable construction of the section to say that, in such a case, the local authority could not require any part of the street to be laid out as a footway. So also, where a street is dedicated with carriageway and footway, they can narrow the footways and widen the carriageway if they think that the requirements of the traffic render it desirable. The effect of reading the definition of "street" in s. 4 into s. 150 is to shew that the local authority can deal with the carriageway of a street under s. 150 apart from the footway and vice versâ, if one requires paving and the other does not. But it does not limit their power to decide how much shall be carriageway and how much footway. Sect. 150 gives the local authority power to interfere with the rights of the owners. The remedy of the owners is to appeal to the Local Government Board under s. 268. The learned judge was therefore right.

Duke, Q.C., was not called upon to reply.

A. L. SMITH L.J. In this case the facts which give rise to the present dispute are these: In 1890 the plaintiff, who was the owner of a piece of land, laid it out as a building estate. The locus in quo was at that time outside the boundaries of the city of Bristol. The plaintiff, as he was bound to do, submitted plans to the local authority, the St. George's Local Board. These plans shewed a proposed road, called Robertson Road, in part 45 feet wide, with a carriageway 30 feet wide and a footway on each side 7 ft. 6 in. wide, and in part 40 feet wide, with a carriageway 27 feet wide and a footway on each side 6 ft. 6 in. wide. Everything was laid out in substantial

(1) (1876) 4 Ch. D. 395, at p. 407.

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A. L. Smith L. J.

accordance with the by-laws of the local authority, and the plans were duly approved by them, and the road was made. In 1897 the boundaries of the city of Bristol were extended by the Bristol Corporation Act, 1897, so as to include the district of the St. George's Urban District Council, who were the successors of the local board. From that time the corporation of Bristol, as the local authority, had jurisdiction over the area which had previously been under the jurisdiction of the St. George's Urban District Council. The corporation were minded to take over Robertson Road, and determined to cut down the width of each of the footways along the whole length of the road to 6 feet, and to throw the space so taken from the footways into the carriageway. In other words, the corporation proposed to alter that which had been sanctioned and approved by their predecessors. They accordingly made out plans, and served notices under s. 150 of the Public Health Act, 1875, upon the frontagers requiring them to execute the necessary works according to the plans, and upon non-compliance with the notices the corporation proceeded to execute the works, when the plaintiff intervened and brought this action to restrain them from altering the width of the footways. The corporation claim that they have power, under s. 150 of the Public Health Act, 1875, to do what they propose to do; in other words, they say that they have power under that section to alter that which the plaintiff has dedicated to the public, and to convert into a carriageway a part of the footway which the plaintiff has dedicated to the public for the use of foot-passengers only. To my mind, s. 150 gives the corporation no such power. The corporation place their claim solely upon s. 150; they do not contend that any other section gives them power to do so. Sect. 150 provides that "where any street"—we must give the word "street" the meaning assigned to it in s. 4—"within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the

premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same within a time to be specified in such notice." I cannot find in that section any power conferred upon the corporation to change any part of the footway into the carriageway, or any part of the carriageway into the footway. They may, under the section, sewer, level, pave, metal, flag, channel, or make good the carriageway or the footway or both, but they have no power to convert any part of an existing footway into a carriageway, or any part of an existing carriageway into a footway. Grantham J., in giving judgment, said that the defendants had power under s. 150 to deal with the road as they thought best for the public interest as regards both the carriageway and the footway. I am unable to agree with him. I can find no such power as that in s. 150. Whether it would be well for the local authority to have that power I do not care to inquire. To my mind they have not got it. I think, therefore, that the appeal should be allowed.

VAUGHAN WILLIAMS L.J. I am of the same opinion. In my judgment there is no power under s. 150 of the Public Health Act, 1875, enabling the urban authority, in this case the corporation of Bristol, to do what they claim to be entitled to do. In my opinion it is clear that the urban authority must deal with a street as they find it, that is, as dedicated to the public, and it is the street so dedicated which they have power under s. 150 to sewer, level, pave, metal, flag, channel, or make good. But this case is especially strong against the corporation. The plans of this street were deposited with the corporation's predecessors, the St. George's Local Board, as required by their by-laws, and those plans shewed the relative proportions of carriageway and footway. The plans so deposited were approved by the local board. In these circumstances I have no doubt that it is the street so approved and laid out according to those plans that the corporation have the power to deal with under s. 150. There is no power under that section in

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the corporation to insist upon paving and making good a street different in the relative proportions of carriageway and footway from that approved of when the plans of the street were laid before the local authority.

ROMER L.J. I agree, and have nothing to add.

Appeal allowed.

Solicitors for plaintiff: *Ford & Ford, for Wansbrough, Dickinson, Robinson & Tayler, Bristol.*

Solicitors for defendants: *Robins, Hay, Waters & Hay, for D. Travers Burges, Bristol.*

A. M.

1900 *May* 10.

BEAUMONT, APPELLANT *v.* BOWERS (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Salary—Deductions—Contribution for Superannuation Allowance—Sum payable or chargeable by virtue of Act of Parliament—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146—*Poor Law Officers Superannuation Act*, 1896 (59 *&* 60 *Vict. c.* 50), *s.* 12.

The appellant, who was clerk to the guardians of a union, and to the assessment and school attendance committees, was assessed in respect of his salary, under Sched. E, on a net amount of 289*l.* He contributed annually under s. 12 of the Poor Law Officers Superannuation Act, 1896, for the purposes of that Act, a sum of 15*l.* 10*s.*, which was deducted from his salary under that section. He claimed to deduct this sum from the amount on which he was assessed, by virtue of the Income Tax Act, 1842, s. 146, Sched. E, First Rule, by which duty is payable on salaries, &c., "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament."

On a case stated:—

Held, that the amount contributed by the appellant, under the Poor Law Officers Superannuation Act, came within the words "duties or other sums payable or chargeable by virtue of any Act of Parliament," in the Income Tax Act, 1842, s. 146, and therefore he was entitled to the deduction claimed.

CASE stated by Commissioners of Income Tax.

Mr. Herbert Beaumont, clerk to the guardians of the poor of the Wakefield Union, appealed against an assessment made

upon him under Sched. E of 16 & 17 Vict. c. 34. The commissioners found the following to be a correct statement of the facts necessary for the consideration of the appeal.

Mr. Beaumont was assessed to the income tax under Sched. E for the year ended April 5, 1899, in the sum of 510*l.*, the amount of his salaries as clerk to the guardians, the assessment committee, and the school attendance committee of the Wakefield Union. From this sum had been deducted 221*l.* for expenses, wholly necessary, and exclusively borne by him in the performance of the duties of the appointments which he held, the deduction being claimed and made under 16 & 17 Vict. c. 34, s. 51, leaving duty payable on the net sum of 289*l.*, which at 8*d.* in the pound amounted to 9*l.* 12*s.* 8*d.* It was admitted that the amounts of the assessments and deductions were correctly set forth, and that no question arose on their accuracy or sufficiency, except in the following particular, which was the subject of this appeal, namely:—

The appellant claimed that the assessment was excessive by the duty on a sum of 15*l.* 10*s.*, deducted from, or paid by, and borne by him for contributions made annually by him under ss. 12 and 13 of the Poor Law Officers Superannuation Act, 1896 (59 & 60 Vict. c. 50), and it was admitted by the surveyor of taxes that no allowance or deduction for that contribution had been made in computing the assessment.

Sect. 12 of the Poor Law Officers Superannuation Act, 1896, makes an annual contribution, according to a scale fixed by s. 13, compulsory on every officer to whom the Act applies.

Sect. 7 provides, in certain conditions of resignation or misconduct, for the forfeiture of all benefits, and of all contributions made for benefits, while allowing the employing authority the discretion of returning the whole or part of the contribution made.

Sect. 8 provides that if an officer, who has not at the time become entitled to benefit, loses his appointment through no fault or act of his own, the whole of his contributions shall be returned to him. In return for these contributions the Act provides for the superannuation of the officer after serving forty

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years, or on his attaining sixty-five years of age, and in other circumstances.

These contributions are not set aside to form a special fund out of which the superannuation allowances become payable, but they are paid into the common fund of the union or unions, in whose service the officer is for the time being, for the years in question, and practically go towards the relief of the rates, and when the superannuation allowance becomes payable it has to be paid out of the common fund of the union in whose service the officer then is, and practically becomes a charge on the rates of that union.

The assessment to income tax in respect of a public office such as the appellant held is laid under the general charging rule of 16 & 17 Vict. c. 34, s. 2, Sched. E, into which have to be read the rules for charging the duties assessable under the now obsolete Sched. E of 5 & 6 Vict. c. 35, s. 146, the first of which rules charges all persons holding public offices with tax on all "salaries, fees, wages, perquisites, or profits . . . . after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same shall have been really and bonâ fide paid and borne by the party to be charged."

Sect. 51 of 16 & 17 Vict. c. 34 provides for a deduction being made from the gross emoluments in respect of any sums of money expended wholly, exclusively, and necessarily in the performance of the duties of the office.

By 16 & 17 Vict. c. 34, s. 54, 16 & 17 Vict. c. 91, s. 1, 18 & 19 Vict. c. 35, s. 1, and 22 & 23 Vict. c. 18, s. 6, a deduction is also authorized for payments made to certain insurance companies and friendly societies therein defined for the purpose of securing deferred annuities.

Sect. 159 of 5 & 6 Vict. c. 35 forbids the commissioners to make any deductions which are not expressly enumerated in the Income Tax Acts.

The appellant admitted that he could not sustain his claim under s. 51 of the Income Tax Act, 1853, as part of the expenses therein specified, nor under the several sections and Acts authorizing allowance of premiums paid to insurance com-

panies and friendly societies to secure a deferred annuity. He based his claim on the words "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament where the same shall have been really and bonâ fide paid and borne by the party to be charged" in s. 146 of the Income Tax Act, 1842.

Supplemental statement of facts agreed on between the solicitors.

The appellant was appointed clerk to the guardians of the Wakefield Union and the assessment committee and school attendance committee of the union prior to the commencement of the Poor Law Officers Superannuation Act, 1896.

The appellant did not exercise the option allowed to him by signifying in writing to the authorities within three months after the commencement of that Act in pursuance of s. 15 his intention not to avail himself of the provisions of the Act.

The commissioners refused to allow the appellant's claim, and confirmed the assessment.

The question for the opinion of the Court was—

Is the amount paid by the appellant under ss. 12 and 13 of the Poor Law Officers Superannuation Act, 1896, a proper deduction to be made from his salary, fees, and emoluments, as clerk to the guardians, and of other appointments held in connection therewith, in arriving at the profits upon which he is liable to be assessed for income tax purposes?

Asquith, Q.C. (*Roskill* with him), for the appellant. The contribution which is made by the appellant as stated in the case, is deducted from his salary under the authority of the Poor Law Officers Superannuation Act, 1896, s. 12, the words of which are compulsory, "shall contribute," and is therefore payable or chargeable by virtue of an Act of Parliament, within the meaning of the Income Tax Act, 1842, s. 146, Sched. E, First Rule. It follows that he is entitled to the allowance which he claims. The contribution is a duty, which means anything that is due, independently of the question whether the person from whom it is due derives any benefit or not. If

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not a duty, it is covered by the words "other sums payable or chargeable," &c. It is "paid and borne" by the appellant. The insertion of words expressly allowing deductions in the Income Tax Act, 1853, s. 54, was necessary, because that section was made to apply to both Sched. D and Sched. E. The decision of the commissioners was therefore erroneous.

Rowlatt (*The Attorney-General* (*Sir Robert Finlay, Q.C.*) and *Danckwerts, Q.C.*, with him), for the respondent. The contribution in question is not such a payment as is intended to be deducted under the Income Tax Act, 1842, s. 146, which is intended to apply only to deductions or payments of duties or other sums of a like nature, from which the person paying derives no benefit, whereas here the appellant gets the benefit of being entitled to a pension. That this is not a deduction which ought to be allowed under s. 146 of the Income Tax Act, 1842, is shewn by the insertion of express words in s. 54 of the Income Tax Act, 1853, for the purpose of authorizing other deductions of a somewhat similar nature. These express words would be unnecessary if s. 146 of the Act of 1842 meant what the appellant contends it means. The appellant's claim is excluded by the Income Tax Act, 1842, s. 159.

Asquith, Q.C., was not heard in reply.

RIDLEY J. I am of opinion that the deduction claimed by the appellant ought to be allowed, on the ground that it comes within the words of s. 146, Sched. E, First Rule, of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), which directs that the duty shall be payable on salaries, &c., "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same shall have been really and bonâ fide paid and borne by the party to be charged." The contribution in respect of which the deduction is claimed is made under s. 12 of the Poor Law Officers Superannuation Act, 1896 (59 & 60 Vict. c. 50), by which, "Subject to the provisions of this Act, every officer and servant in the service or employment of the guardians of a union shall contribute annually for the purposes of this Act a percentage amount of his salary or wages and emoluments according to

the scale laid down by this Act, such amount to be from time to time deducted from the salary or wages payable to him and to be carried to and form part of the common fund of the union." Primâ facie Mr. Asquith is right in saying that the contribution made by the appellant is a sum payable or chargeable on his salary under that Act. I do not think it necessary to go through all the arguments which have been put forward on behalf of the Crown; but one of them, which turns on the Income Tax Act, 1853 (16 & 17 Vict. c. 34), is worthy of discussion. Sect. 54 of that Act provides that "Any person who shall have made insurance on his life or on the life of his wife, or shall have contracted for any deferred annuity on his own life or on the life of his wife"—with certain insurance companies—"and any person who shall under any Act of Parliament be liable to the payment of an annual sum, or to have an annual sum deducted from his salary or stipend, in order to secure a deferred annuity to his widow or a provision to his children after his death, shall be entitled to deduct the amount of the annual premium paid by him for such insurance or contract, or the annual sum paid by him or deducted from his salary or stipend as aforesaid, from any profits or gains in respect of which he shall be liable to be assessed under either of the Schedules (D) or (E) of this Act," &c. It was argued that, because it was thought necessary specifically to enact that the deductions mentioned in that section shall be allowed, it followed that cases like the present were not included, because in that section only cases of provision made for widows and children are specified. The argument is that from the express enumeration in s. 54 of deductions which are to be allowed it follows that the deduction claimed in the present case must not be allowed. I think the real answer is, that s. 54 deals only with the case of insurance effected or sums deducted for the purpose of making provision after the death of the person for the benefit of those who come after, whereas s. 146 of the Income Tax Act, 1842, provides that all "duties or other sums payable or chargeable by virtue of any Act of Parliament" may be deducted. The amount of the deduction claimed in the present case is payable or chargeable

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by virtue of the Poor Law Officers Superannuation Act, 1896, s. 12. It follows that the appellant is entitled to the deduction which he claims, and our judgment must be in his favour.

DARLING J. I am of the same opinion. The deduction is claimed on the ground that by the Income Tax Act, 1842, s. 146, Sched. E, First Rule, the duty is payable on the appellant's salary "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament." The appellant contributes a portion of his salary under the Poor Law Officers Superannuation Act, 1896, and by virtue of s. 12 of that Act the amount of his contribution is payable or chargeable on his salary, within the meaning of s. 146 of the Income Tax Act, 1842. It is plain from the Act of 1896 that he might never get any benefit from his contributions, for he might die, or other circumstances might arise which would render it impossible for him to get any benefit, so that if this deduction were not allowed he might be charged on a sum which would never be received, and might have to pay income tax on money which would never reach him. It is plain that the words "duties or other sums payable or chargeable on the same," in their natural sense, would include the contribution made in the present case, and I do not see how we can narrow the words so as to exclude it. There are somewhat similar words in s. 54 of the Income Tax Act, 1853, and it is argued on behalf of the respondent that it would have been unnecessary to insert those words if s. 146 of the Income Tax Act, 1842, meant what the appellant contends it means; but s. 54 of the Act of 1853 does not cover all the ground covered by s. 146 of the Act of 1842, nor does s. 146 cover all the ground covered by s. 54. I cannot see why the words should not have their plain meaning. It should be remembered that Acts of Parliament are not passed exactly as drawn, and by reason of amendments are not always perfectly logical and consistent, and it is possible that a subsequent statute may enact a provision which has already been enacted by a prior statute, and this may possibly be the case here. For

these reasons I am of opinion that the appellant is entitled to judgment.

Judgment for the appellant.

Solicitors for appellant: *Bridges, Sawtell & Co., for Vulliamy & Son, Ipswich.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

P. B. H.

In re FORD. *Ex parte* THE TRUSTEE.

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May 8, 19.

Bankruptcy—Pending Action—Rules of the Supreme Court, 1883, *Order* XIV., *r.* 6—*Payment into Court for Leave to Defend—Bankruptcy of Defendant before Trial—Secured Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 168.

Money paid into court under the Rules of the Supreme Court, 1883, Order XIV., for leave to defend, must be treated as money paid in to abide the event, and is a security to the plaintiff for the sum for which he may obtain judgment at the trial; and if the defendant becomes bankrupt before the trial the money must remain in court until "the event" is decided by the trial of the action, if that is to be tried, or by adjudication upon a proof by the plaintiff in the bankruptcy.

THIS was an application by the trustee in bankruptcy, and raised the question as to who was entitled to a sum of money in court under these circumstances.

In August, 1899, Messrs. Jay sued one Ford in the Queen's Bench Division for 1116*l.* 4*s.* 6*d.*, and applied for judgment under the Rules of the Supreme Court, 1883, Order XIV. On September 21 Ford obtained leave to defend on an affidavit suggesting fraud. The order was as follows: "It is ordered that the plaintiffs be at liberty to sign final judgment for the claim indorsed on the writ and costs to be taxed unless the sum of 1000*l.* be paid into court within three days." The money was paid into court, and Ford delivered a defence and counter-claim, which was amended by leave on January 10, 1900. On January 29 Ford filed his own petition in bankruptcy, on which a receiving order was made and adjudication

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FORD, *In re.* THE TRUSTEE, *Ex parte.*

followed. The trustee in the bankruptcy now claimed that the 1000*l.* in court in the action of *Jay* v. *Ford* was part of the bankrupt's estate and should be paid out to him.

Muir Mackenzie and *Sinclair*, for the trustee. The order of September 21 cannot affect the rights of the general body of the creditors of the bankrupt. The money was paid into court, not "to abide the event," as in *Tomlinson* v. *Hampson* (1), but for leave to defend. It remained the property of the defendant unless and until the plaintiffs proved their title to it. But before their title was perfected, the defendant's bankruptcy supervened, and the plaintiffs' claim became a debt provable in the bankruptcy: *Barter* v. *Dubeux* (2); *Ex parte Halling*. (3) The respondents may rely on *Ex parte Navalchand* (4), but that case is distinguishable. There, the money was paid into court under the Rules of the Supreme Court, 1883, Order XXII., and the plaintiff could have taken it out if he had chosen. But money paid in under Order XIV. to obtain leave to defend remains in court and cannot be taken out by the plaintiff.

[WRIGHT J. Was not the money paid in under the words "subject to such terms as to giving security" in rule 6 of Order XIV.?]

The order that was made does not say so. It is submitted that the money was paid in as a test or guarantee of bona fides, and that the plaintiffs are not secured creditors within the meaning of s. 168 of the Bankruptcy Act, 1883. Their only remedy is to prove in the bankruptcy.

Reed, Q.C., and *Macaskie*, for the respondents. The claim of the trustee is inconsistent with the authorities. In substance the money was paid in "to abide the event," and became a security to the plaintiffs to the extent to which they can establish their claim: *Ex parte Banner* (5); *Ex parte Bouchard* (6); *The Cella*. (7)

(1) (1894) 38 Sol. J. 401.
(2) (1881) 7 Q. B. D. 413.
(3) (1877) 7 Ch. D. 157.
(4) [1897] 2 Q. B. 516.
(5) (1874) L. R. 9 Ch. 379.
(6) (1879) 12 Ch. D. 26.
(7) (1888) 13 P. D. 82.

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Muir Mackenzie, in reply. The trustee relies on the terms of the order of September 21.

Cur. adv. vult.

WRIGHT J., after stating the facts, continued:—The trustee in the bankruptcy now claims the money on the ground that, as he alleges, the 1000*l.* still remained the money of the bankrupt at the time when the trustee's title accrued, and that the plaintiffs at that time and now were and are mere ordinary creditors for whatever debt they may be able to prove. I say nothing about there being no evidence to shew that the money was the bankrupt's. It seems plain in principle and on the authorities that Messrs. Jay are for the present entitled to the benefit of the security which they obtained by the order of September 21, 1899, and the payment into court in compliance with that order. The order must be treated as an order that the right to the money when paid into court shall abide the event: see *Bird* v. *Bastow* (1), where the order appears to have been in the same form as in this case; and it is settled that where money is ordered to be paid into court to abide the event it must be treated as a security that the plaintiff shall not lose the benefit of the decision of the Court in his favour: *Ex parte Banner* (2); *Ex parte Bouchard* (3); *Ex parte Navalchand* (4); *Tomlinson* v. *Hampson*. (5) The very object of such an order is that the plaintiff shall be in as good a position, so far as the money paid in extends, against contingencies such as bankruptcy as if he had got an immediate judgment; and the cases cited shew that, where the plaintiff has without default on his part failed to get judgment before the bankruptcy, "the event" is the decision of his right in the bankruptcy. The money must remain in court until "the event" is decided by the trial of the action, if that is to be tried, or by adjudication upon a proof by the plaintiffs in the bankruptcy.

Solicitors: *Nunn & Popham; Francis & Johnson.*

(1) [1892] 1 Q. B. 94.
(2) L. R. 9 Ch. 379.
(3) 12 Ch. D. 26.
(4) [1897] 2 Q. B. 516.
(5) 38 Sol. J. 401.

H. L. F.

1900
Feb. 26, 27;
April 11.

[IN THE COMMERCIAL COURT.]

GEDGE AND OTHERS *v.* ROYAL EXCHANGE ASSURANCE CORPORATION.

Insurance, Marine—Policy—Insurable Interest—"P.p.i. Clause"—Wagering Policy—"Ship"—Marine Insurance Act, 1745 (19 *Geo.* 2, *c.* 37), *s.* 1.

A policy of marine insurance whereby the assured is entitled to be indemnified against loss in respect of the non-arrival of a ship at a certain port by a certain date is a policy of insurance on the ship within the meaning of 19 Geo. 2, c. 37, s. 1.

Where, on the trial of an action, the plaintiff's case discloses that the transaction which is the basis of his claim is illegal, the Court cannot properly ignore the illegality or give effect to the claim, even if the illegality be not pleaded or relied on by the defendants. The Court will, therefore, not enforce a policy of marine insurance which is illegal under 19 Geo. 2, c. 37, s. 1, by reason of its containing a clause that the policy itself is to be deemed a full and sufficient proof of interest, although that defence is not set up by the underwriters.

ACTION upon a policy of marine insurance, which was expressed to be made at and from London to Yokohama, to pay a total loss in the event of the vessel not arriving at Yokohama on or before midnight on December 31, 1898, the policy containing the following clause: "It is hereby agreed that this policy shall be deemed a full and sufficient proof of interest." The defendants in their points of defence did not plead the invalidity of the policy under the provisions of 19 Geo. 2, c. 37, s. 1 (1), their defences being—(1.) concealment of material facts, and (2.) that the assured had no insurable interest in the subject-matter of the insurance. The policy was in fact a wager on the part of the assured against the arrival of

(1) By 19 Geo. 2, c. 37 (The Marine Insurance Act, 1745), s. 1 "No assurance or assurances shall be made by any person or persons, bodies corporate or politick, on any ship or ships belonging to His Majesty, or any of his subjects, or on any goods, merchandises, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and every such assurance shall be null and void to all intents and purposes."

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the vessel at Yokohama by the specified date. The circumstances under which the insurance was effected appear at length in the judgment.

Isaacs, *Q.C.*, and *J. A. Hamilton*, for the plaintiffs. The plaintiffs are entitled to recover upon this policy. The proof of insurable interest is the policy itself, which, apart from the statutory restriction in 19 Geo. 2, c. 37, s. 1, is binding; the defendants have not in terms pleaded the statutory defence, and there is no issue on the pleadings which raises it. Nor do the defendants in fact rely on that defence. The statutory defence that a policy is null and void as being made without proof of interest, and therefore a gaming or wagering policy, must be taken in the pleadings; such a defence has a strong analogy to that of the Statute of Frauds, which must be pleaded: *James* v. *Smith* (1), where it was held that there was nothing to prevent the Court giving effect to a parol declaration of trust, as the opportunity of pleading that defence had not been taken. The defence that the action is barred by the Statute of Limitations, which is also analogous, must be pleaded in order to avoid a contract: *Hawkings* v. *Billhead* (2); *Dawkins* v. *Lord Penrhyn* (3), per Lord Cairns; Order XIX., rr. 15, 16. The Court can only try the issues on the record: *Wells* v. *Abrahams* (4); it cannot interfere in such a case where no question of public policy is brought before it by a public officer; it has not merely a discretionary power to try the action, but is bound to do so. *Buchanan* v. *Faber* (5) is an authority for the proposition that, where the fact is brought before the Court that the instrument sued on does not accord with the statutory restrictions, the Court may hear the case with the consent of the parties. Secondly, the statute does not apply to this policy at all, for it is not a policy on "ship" (6); the transaction is not in its nature an insurance on a ship, but an insurance against the non-arrival of a ship at

(1) [1891] 1 Ch. 384.
(2) (1635) Cro. Car. 404.
(3) (1878) 4 App. Cas. 51.
(4) (1872) L. R. 7 Q. B. 554.
(5) (1899) 4 Com. Cas. 223, 227, n.
(6) NOTE. — The word "ship," although inserted in the policy, did not appear in the slip.

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a particular port by a particular date; this is conclusively shewn by the fact that if the ship had during the voyage become a constructive total loss, but had nevertheless managed to arrive at Yokohama as a wreck within the time limit, no claim would have arisen on the policy. Thirdly, there was no concealment. In order to vitiate a policy on that ground, some fact must be concealed which is material in the sense that its disclosure would have affected the mind of an ordinary rational underwriter as to taking or refusing the risk, or as to the amount of the premium; there is no obligation to disclose a fact the disclosure of which has been impliedly waived by the underwriter: *Carter* v. *Boehm* (1); Arnould on Marine Insurance, 6th ed. i. 587. The insertion of the p.p.i. clause in the slip was a plain notice to the underwriter that there might be no interest to cover, and he ought to have inquired as to any further facts which he desired to know before undertaking the risk: *Fort* v. *Lee*. (2)

[They also cited Phillips on Insurance, sec. 585.]

Joseph Walton, Q.C., and *Scrutton*, for the defendants. The defendants do not raise the statutory defence that the policy is null and void by reason of the insertion of the p.p.i. clause; they are prepared to treat the policy as being good upon its face, and to rely upon the defence that the action is not maintainable by reason of the concealment of a material fact. The policy was clearly a policy on "ship," and it was material to the underwriters to know that the transaction was a mere bet as to the ship's arrival at a given port by a given date; a knowledge of that fact would obviously affect the rate of premium, and would be as material to be known as the fact of gross over-valuation of cargo, the concealment of which will vitiate a policy: *Ionides* v. *Pender*. (3) Nor is it even necessary that the fact concealed should be material with regard to the risk insured. It is sufficient if it is material in order to enable the underwriter to judge as to whether he will accept the risk: *Rivaz* v. *Gerussi* (4), where systematic under-valuation of shipments was held to be a material fact, the non-

(1) (1766) 3 Burr. 1905.
(2) (1811) 3 Taunt. 381; 12 R. R. 670.
(3) (1874) L. R. 9 Q. B. 531.
(4) (1880) 6 Q. B. D. 222.

disclosure of which vitiated the policy. The insertion of the p.p.i. clause in the slip does not suggest to an underwriter an inquiry into the question whether the transaction is a bet; that clause is almost always used in policies on disbursements and very frequently in insurances on freight, although the latter are almost always effected by persons having in fact an insurable interest.

Cur. adv. vult.

April 11. The following written judgment was delivered by

KENNEDY J. This action is brought by the plaintiffs, who are insurance brokers, suing really on behalf and for the benefit of a Mr. Rouse and certain other gentlemen associated with him, against the defendants, on an alleged policy of marine insurance, dated November 14, 1898, upon the British steamer *Radnorshire*, belonging to the "Shire" line. The policy, as pleaded by the plaintiffs, is a policy for 400*l.* on the said steamship at and from London to Yokohama, to pay a total loss in the event of the vessel not arriving at Yokohama on or before midnight on December 31, 1898. It is pleaded by the plaintiffs that the vessel did not arrive at Yokohama on or before midnight on that day, and the amount insured is claimed by the plaintiffs. In fact, as appeared when the document was produced by the plaintiffs in evidence, the alleged policy is what is known as a "p.p.i." or "honour" policy, one of its terms being that, in the event of loss, "it is hereby agreed that this policy shall be deemed a full and sufficient proof of interest." The defendants, in the points of defence, do not plead the invalidity of the alleged policy under the provisions of 19 Geo. 2, c. 37, s. 1. Their pleaded defences, in addition to a refusal to admit the correctness of the statement of the plaintiffs as to the terms of the alleged policy, are—(1.) concealment of material facts, and (2.) that the persons on whose behalf the plaintiffs effected the alleged policy had no insurable interest in the subject-matter insured.

The alleged policy was in truth, so far as regards the purpose of Mr. Rouse and certain other gentlemen for whom it was effected, a mere wager or wagering speculation. It appears

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that some time before November 14, 1898, the Government of Japan had made an ordinance whereby goods imported into Japan after December 31, 1898, should be liable to a higher duty than had previously been levied. This was known to Mr. Rouse, who was employed in the London office of a Japanese insurance company, called the Nippon, and he had a conversation with a Mr. Pound, who was an insurance clerk in the plaintiffs' office, upon the subject of insurances being, in consequence of the ordinance, effected in regard to the arrival in Japan of vessels carrying goods to that country. It occurred to Mr. Rouse that there was an opportunity of having what he called a "spec." He asked Mr. Pound if he thought he would be able to do a "spec" for him; Pound said he thought he might be able. They then parted. Mr. Rouse returned to his office, and read in *Lloyd's Shipping Gazette* that the *Radnorshire* was the vessel of the line of steamships running between London and Japan under the management of Messrs. Jenkins & Co. which had last sailed for Japan, and that she was reported to have passed the Downs on October 30. Believing that a vessel of that type might be expected to take, roughly, about two months on the voyage, he saw from her reported position that, to use his own words, her arrival before January 1, 1899, was obviously a close thing and what he wanted for a "spec." He mentioned his project to certain other gentlemen in the Nippon office, and they agreed to share with him in the speculation. In the result, through Mr. Pound (acting as the agent to propose an insurance), Mr. Rouse and his fellow-speculators carried out their project by obtaining from the defendants the policy in question, the slip for which was initialled by Mr. Toulmin on behalf of the defendant company. Had Mr. Toulmin known the real nature of the transaction—namely, that it was a mere bet or speculation without any interest on the part of those for whom in reality the insurance was effected—he would have declined the risk altogether. It is at the same time only just to Mr. Rouse and his friends to add that they appear to have desired throughout the transaction to act in a candid and straightforward manner. It was not through any

fault of theirs that the purely speculative nature of the transaction was not disclosed to Mr. Toulmin.

It appears to me that when upon the trial of an action the plaintiffs' case, as happens here, discloses that the transaction which is the basis of the plaintiffs' claim is illegal, the Court cannot properly ignore the illegality and give effect to the claim. Here the insertion of the p.p.i. clause taints the whole of the plaintiffs' case. The statute 19 Geo. 2, c. 37, s. 1, expressly forbids the making of an assurance upon a British ship without further proof of interest than the policy, and goes on to declare that every such assurance shall be null and void to all intents and purposes. It has been suggested by the plaintiffs that the present policy is not a policy on a ship within the meaning of this section. I am clearly of opinion that it is. An assurance whereby the assured is entitled to be indemnified against loss in respect of the non-arrival of the ship at a certain port by a certain date may, I think, be correctly described as an assurance on the ship. If authority is wanted, I think that it appears in the case—very similar indeed in its circumstances—of *Kent* v. *Bird* (1), which was decided upon the same statute. There the defendant undertook that a vessel should save her passage to China that season, and, in the action brought upon the document of insurance, judgment was given for the defendant on the ground that the transaction was the making of a gaming or wagering policy on a ship within the meaning of the statute.

Attempts to narrow the section when it speaks of an assurance on goods, merchandise, and effects, similar to the attempt of the plaintiffs in this case in regard to an assurance upon "ship," were unsuccessfully made in *Smith* v. *Reynolds* (2); *De Mattos* v. *North* (3); *Allkins* v. *Jupe* (4); *Berridge* v. *Man On Insurance Co.* (5) These cases shew that assurances on profits, commission, and advances are covered by the section, when it speaks of assurances on "goods, merchandise or effects."

(1) (1777) Cowp. 583.
(2) (1856) 1 H. & N. 221.
(3) (1868) L. R. 3 Ex. 185.
(4) (1877) 2 C. P. D. 375.
(5) (1887) 18 Q. B. D. 346.

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This policy, then, being an illegal instrument—an assurance which, in the language of Grove J. in *Allkins* v. *Jupe* (1), is contrary to the direction of the statute, and so unlawful in all its incidents that the law will not countenance any part of it—I cannot give judgment upon it in favour of the plaintiffs. Their counsel argued that the illegality was not pleaded by the defendants; in my opinion that makes no difference. "Ex turpi causâ non oritur actio. This old and well-known legal maxim is founded in good sense and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him": per Lindley L.J. in *Scott* v. *Brown, Doering, McNab & Co.* (2) "If," said Lord Mansfield in his judgment in *Holman* v. *Johnson* (3) (which Lindley L.J. refers to as an authority immediately after the passage I have just quoted), "from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causâ or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." Order XIX., r. 16, upon which Mr. Hamilton for the plaintiffs laid much stress, does not touch (as the judgment of Lindley L.J., which I have quoted, clearly indicates) a case like the present, in which the illegality of the transaction appears upon the face of the plaintiffs' case. The purpose of that rule, as it appears to me, is to prevent the injustice which might arise from a litigant, without notice to his opponent, adducing evidence to shew that a transaction which apparently is perfectly legal is

(1) 2 C. P. D. 375. (2) [1892] 2 Q. B. 724.
(3) (1775) Cowp. 341.

really illegal, as, for example, that an apparently good deed was really fraudulent under 13 Eliz. c. 5; or the similar injustice which might arise if a litigant, who would otherwise have been prepared with evidence to surmount them, were suddenly called upon at the trial for the first time to meet objections to the pursuit of a legal remedy based upon the Statute of Limitations or the Statute of Frauds, or were called upon to deal with issues of which he had no notice. The rule does not affect a case like the present.

There is, I think, only one other point in the argument of the plaintiffs' counsel upon this part of the case which I have to notice. It was urged that the defendants themselves were wishful that the policy should not be held void on account of its having been made in terms prohibited by the statute. Certainly the defendants' counsel did so state their attitude. But I hold that my judgment ought not to be affected by this consideration. I was referred to the course taken by Bigham J. in the recent case of *Buchanan & Co.* v. *Faber*. (1) In that case the policy sued on contained the p.p.i. clause. In a note to the report it is stated that my brother Bigham, after consultation with Mathew J., intimated that he would, with the consent of the parties, hear the case as if the policy did not contain the p.p.i. clause. I need not say that I should be very slow not to adopt a course which they had approved, and, if I ever felt compelled by my own conviction to take a different view from them, I should have very great misgiving as to the correctness of my own. But what I am invited to do here is something quite different from that which was asked by the parties and permitted by my brother Bigham in that case. That was, in effect, to treat the vitiating clause as deleted. What I am invited to do is to treat the policy as valid with the vitiating clause retained as part of it. If that were done here which the Court did in *Buchanan & Co.* v. *Faber* (1), if I dealt with this policy as if it contained no p.p.i. clause, the plaintiffs, so far from being helped, would obviously be involved in a fatal difficulty. They admittedly never had any insurable interest; the absence of such an

(1) 4 Com. Cas. 223, 227, n.

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interest has been pleaded by the defendants; and the only possible reply to this defence lies in the presence in the policy of the p.p.i. clause. If that is treated as gone, the plaintiffs' case goes with it.

Deciding this case, as I do, upon the grounds which I have stated, I feel, nevertheless, in view of the care bestowed upon it by the learned counsel on both sides, that I ought not to let pass unnoticed another aspect of the case which was presented for my consideration. The defendants argue that, even if the policy can be treated as not invalidated by the p.p.i. clause, they have a good defence to the action because it was obtained by the concealment of a material fact—a fact, that is to say, "which, if communicated, would affect the judgment of a rational underwriter in considering whether he would enter into the contract at all, or enter into it at one rate of premium or at another": see per Brett L.J. in *Rivaz* v. *Gerussi*. (1) The fact referred to is the purely speculative character of the transaction. That it was not expressly communicated by Mr. Pound to Mr. Toulmin is undisputed. But the plaintiffs say to the defendants, "You are not entitled to rely upon this non-disclosure; you knew perfectly well that we were negotiating for a policy with a p.p.i. clause, and you contracted to give us such a policy; Mr. Pound was justified in assuming that Mr. Toulmin knew all he had to tell, and in the circumstances you must be taken to have waived being informed of the purely speculative nature of the risk": see *Carter* v. *Boehm*. (2)

It appears to me that there is much to be said for this view; but, upon the whole, if it was open to me to treat the policy as a valid policy and I had to decide the case upon this point, I should feel myself, upon the evidence adduced before me, obliged on this point also to decide in favour of the defendants' contention. On the materiality of the fact of this being purely a speculative or wagering venture on the part of Mr. Rouse and his friends, Mr. Toulmin is clear and emphatic. He would not have entertained the risk if he had known of it. As I understand his evidence, "policy proof of interest," in the ordinary understanding of underwriters, means at least the

(1) 6 Q. B. D. 222, at p. 229. (2) 3 Burr. 1905.

possible existence of *a* business interest—an interest which may be hard to prove or may not admit of legal proof as an insurable interest, but still some business interest. The facts in the case of *Buchanan & Co.* v. *Faber* (1), to which I have had occasion to refer, afford an illustration, I think, of a class of risk of this latter sort. In fact, the clause is sometimes stipulated for in policies which are intended to cover substantial interests, such as disbursements and advances. It is not understood, if I follow Mr. Toulmin's evidence correctly, to cover a mere wager. The only case, according to Mr. Toulmin, in which he has accepted a purely speculative or wagering risk—and that he has done only on rare occasions—is in the particular case of overdue vessels, and then only at specially agreed rates of premium. The defendants' evidence is substantially confirmed, I think, by the conduct and by the evidence of Mr. Rouse. Mr. Rouse is himself a clerk in an insurance office, and he expressly enjoined Mr. Pound to state, in negotiating for insurance, the speculative nature of the transaction. The idea was, he says, that they could not be too careful. He says, no doubt, elsewhere in his cross-examination, that he did not see the materiality of a "spec." or real interest; but he goes on to admit that the underwriter would probably quote a higher rate of premium in the case of a "spec." Mr. Pound's excuse for not obeying Mr. Rouse's instructions on this point, as given by him to Mr. Rouse, was that he had not got the chance of making the disclosure. It was a quite insufficient excuse, as I understand what took place between Mr. Pound and Mr. Toulmin. But I believe that Mr. Pound did not at all mean to do anything improper or unfair. I think he honestly drew an unwarranted inference from Mr. Toulmin's words and manner that Mr. Toulmin either knew, or was willing to waive inquiry about, the circumstances of the insurance.

Upon the whole, as I have already said, upon the evidence before me, if I had to decide on this issue, I should feel obliged to decide it in favour of the defendants. It is not, however, necessary for me to do so, and I give judgment for

(1) 4 Com. Cas. 223.

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the defendants on the grounds which I have previously stated. Under the circumstances of the case, including that to which I need not refer, except for this purpose, namely, that, as appears by Mr. Toulmin's letter, the defendants repudiated the policy for reasons which the facts do not warrant and which implied an unjust imputation upon the plaintiffs' representative, I give judgment for the defendants without costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*

W. J. B.

C. A.

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May 21, 30.

[IN THE COURT OF APPEAL.]

EVANS *v.* JUSTICES OF CONWAY.

Licensing Acts—Licence—Renewal—Appeal to Quarter Sessions—Onus of Proof—Refusal to Renew without Evidence—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 27.

On an appeal to quarter sessions against the refusal of licensing justices to renew a licence, the quarter sessions are not entitled to refuse to renew the licence without evidence of any ground of objection to its renewal:—

So *held*, reversing the decision of a Divisional Court, ante, p. 5.

APPEAL from the judgment of a Divisional Court (Channell and Bucknill JJ.) upon a case stated from the Carnarvonshire Quarter Sessions in an appeal against the refusal of licensing justices to renew a licence. (1)

The appellant, Evans, was the holder of a licence for the sale of intoxicating liquors in respect of a house at Conway known as the Royal Oak Inn. At an adjourned general annual licensing meeting held at Conway for the Conway Division in the county of Carnarvon on September 25, 1899, he applied for a renewal of the above-mentioned licence. The Rev. T. Gwynedd Roberts objected to the renewal of the licence. The licensing justices refused to renew the licence. The

(1) Ante, p. 5.

appellant thereupon gave notice of appeal to the quarter sessions. At the quarter sessions the appellant appeared by counsel to support the appeal, and apply for the renewal of the licence. No one appeared on behalf of the licensing justices, but a solicitor appeared for the Rev. Mr. Roberts. It was contended by counsel for the appellant that the solicitor for Mr. Roberts had no locus standi, and that, as no one appeared on behalf of the justices, the appellant was entitled to have his appeal allowed, and his licence renewed. The quarter sessions overruled these contentions, and decided to hear the appeal. Thereupon counsel for the appellant, having formally proved that due notice of the appeal had been served upon all the justices who sat at the licensing meeting, and that the appellant together with two sureties had duly entered into the required recognizances, applied on behalf of the appellant for renewal of the licence. The quarter sessions thereupon, without hearing any evidence on behalf of the respondents, or in opposition to the renewal of the licence, dismissed the appeal, and refused to renew the licence. The question for the opinion of the Court was whether they were right in so doing.

The Divisional Court held that they were and affirmed their decision.

May 21. *Foote, Q.C.*, and *Trevor F. Lloyd*, for the appellant. The quarter sessions were not entitled to dismiss the appeal in the absence of evidence to shew that the licence ought not to be renewed. It is a necessary implication from the provisions of s. 42 of the Licensing Act, 1872, that the licensing justices cannot refuse the application for renewal of the licence in the absence of evidence on oath in support of an objection thereto. The appeal to the quarter sessions is a rehearing, and the quarter sessions are in that respect in the same position as the licensing justices. The appellant having proved that he has given the proper notices of appeal, the onus of proof with regard to the renewal is not upon him: see per Lord Bramwell in *Sharp* v. *Wakefield* (1); and, therefore, without evidence of any objection to the renewal of the licence the quarter sessions

(1) [1891] A. C. 173, at p. 184.

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cannot refuse to grant the renewal. It was held in *Boulter* v. *Kent Justices* (1) that justices at a licensing meeting are not a court of summary jurisdiction; and, therefore, that appeals from them to quarter sessions are not regulated by s. 31 of the Summary Jurisdiction Act, 1879, and the objector is not a "party" within the meaning of that section. It does not, however, necessarily follow from that decision that the objector cannot give evidence as a witness and be heard by permission of the sessions; but, assuming that he cannot, then the onus lies on the licensing justices as the only respondents to the appeal, and, if no evidence is given, the sessions must allow the appeal.

[They also cited the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 27: *Whiffen* v. *Malling Justices* (2); *Tynemouth Corporation* v. *Attorney-General* (3); *Ruddick* v. *Liverpool Justices.* (4)]

Asquith, Q.C., and *Ellis J. Griffith*, for the respondents. There is no primâ facie right to a renewal of a licence; and the justices have as absolute and unqualified a discretion with regard to the renewal of a licence as they had with regard to the original grant of it. It is a fallacy to suppose that there is any presumption in favour of the holder of the licence. The quarter sessions on an appeal have the same discretion as the licensing justices. The argument with regard to onus of proof implies that the proceeding is a litigation inter partes, and that the objector is a party, which is directly contrary to what was said in the House of Lords in *Boulter* v. *Kent Justices* (1) and *Tynemouth Corporation* v. *Attorney-General.* (3) The function exercised by the justices and the sessions with regard to the renewal of licences is merely administrative. If there was no presumption in favour of the applicant for the renewal before the licensing justices, a fortiori there was none on the appeal to the quarter sessions. The appellant not shewing to the sessions any reason why they should reverse the exercise by the licensing justices of their discretion, it was entirely within the discretion of the sessions to refuse to renew the licence. They were entitled to presume primâ facie that the administrative

(1) [1897] A. C. 556.
(2) [1892] 1 Q. B. 362.
(3) [1899] A. C. 293.
(4) (1876) 42 J. P. 406.

body to whom the Legislature has entrusted an absolute discretion in the matter, namely, the licensing justices, had exercised that discretion rightly. Assuming that the quarter sessions act for some purposes as a court on appeals under the Alehouse Act, 1828, s. 27, every court has a right to regulate its own procedure except so far as it is regulated by statute. There is no statute which constrains the quarter sessions to allow the appeal merely because no one appears to support an objection to the renewal.

[They cited *Reg.* v. *Staffordshire Justices.* (1)]

Foote, Q.C., in reply. The House of Lords decided in *Boulter* v. *Kent Justices* (2) that the licensing justices are not a court of summary jurisdiction, and therefore the provisions of the Summary Jurisdiction Acts with regard to appeals from such courts did not apply, but not that the quarter sessions is not a court in relation to an appeal under the Alehouse Act, 1828, s. 27. That section by its terms implies that the quarter sessions acts as a court. It speaks of the decision of the sessions as "the judgment of the court," and says that it shall "hear and determine" the matter of the appeal, and "shall make such order therein, with or without costs, as to the said court shall seem meet." The quarter sessions may not be bound to grant the renewal merely because no one appears to support the objections to the renewal; but what is contended is that they cannot refuse the renewal without making any inquiry into the objections. They might perhaps have directed the appellant to be sworn and asked him questions. They could not say to the appellant that he must prove his case, for he has no affirmative case to prove.

Cur. adv. vult.

May 30. A. L. SMITH L.J. read the following judgment of the Court (A. L. Smith L.J., Vaughan Williams L.J., and Romer L.J.):—The Queen's Bench Division in this case has held, with very great doubt and inviting an appeal to this Court, that, when a publican appeals to a court of quarter sessions, which he is clearly entitled to do under s. 27 of the

(1) [1898] 2 Q. B. 231. (2) [1897] A. C. 556.

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Alehouse Act of 1828, against the refusal of a licensing meeting to grant him a renewal of his licence, the court of quarter sessions can refuse to grant him such renewal without any evidence whatever being given as to why such renewal should not be granted. It was argued by Mr. Asquith on behalf of the justices that the cases of *Sharp* v. *Wakefield* (1), *Boulter* v. *Kent Justices* (2), and *Tynemouth Corporation* v. *Attorney-General* (3) shew that the court of quarter sessions can do so. We will deal with these cases hereafter. It seems to us that, apart from these cases, a court of quarter sessions cannot do so.

The facts are these: Evans, the publican, applied to the general annual licensing meeting for the renewal of the licence which he then held for the sale of intoxicating liquors in respect of a house known as the Royal Oak Inn, Conway, and the Rev. Mr. Roberts then appeared and objected to the renewal of the licence. It is not stated in the case submitted to the Court upon what grounds he objected, but the justices at the licensing meeting refused to grant the renewal; nor is it stated upon what ground the licensing justices refused. But it was said at the bar that he objected upon the ground, first, that the house was not necessary for the requirements of the neighbourhood; and, secondly, upon the ground that the premises were incapable of effective police supervision; and it was also stated that it was thought that upon the latter ground it was that the licensing justices refused the renewal. The publican then appealed to quarter sessions against this refusal. It was there proved on his behalf that due notice of appeal had been given and that he had entered into the required recognizance. The licensing justices did not appear at quarter sessions to oppose, nor was any evidence given in support of any objection to the renewal, and thereupon the court of quarter sessions, without hearing any evidence, refused to renew the licence.

Now, unless the provisions of s. 42 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), both as to the notice of objection

(1) [1891] A. C. 173. (2) [1897] A. C. 556.
(3) [1899] A. C. 293.

which must be given and as to the evidence which must be forthcoming, are complied with, it cannot, we think, be doubted that a renewal of a licence cannot be refused by licensing justices at a licensing meeting: see the observations upon this section by Blackburn J. in *Reg.* v. *Farquhar* (1); and it has been held by Hannen J. and Quain J. that the requirements of this section apply equally to the court of quarter sessions when a publican appeals thereto against the refusal of the licensing justices to renew his licence as to a licensing meeting: *Ruddick* v. *Liverpool Justices.* (2) Apart, therefore, from the cases cited by Mr. Asquith, the court of quarter sessions could not, in our judgment, without hearing some evidence, have done what they have done and refused offhand the renewal of the publican's licence.

It was held in the case of *Whiffen* v. *Malling Justices* (3) that an appeal to the court of quarter sessions against the refusal of licensing justices to renew a licence amounts to a rehearing, and not to a simple appeal; and, as was stated by Lord Bramwell in *Sharp* v. *Wakefield* (4), "when there is an appeal against a refusal of a first (5) licence, the appellant (at quarter sessions) begins, the burthen of proof is on him, he has to make out that he ought to have a licence. Where, on the other hand, the appeal is against a refusal to renew a licence, the respondents begin, the burthen of proof is upon them, they have to make out that he ought not to have a licence, practically that his licence should be taken from him." And it is admitted that it is the practice of the Carnarvonshire Quarter Sessions, in an appeal against the refusal of the licensing justices to renew a licence, for respondents to begin. If no one is at quarter sessions to give evidence upon an appeal against the refusal of the licensing justices to renew a licence, how is the burden of proof satisfied? It appears to us that it is not. My brother Channell says that a man who has a licence has a primâ facie right to have it renewed. In this we agree. But he says that the court of quarter sessions may

(1) (1874) L. R. 9 Q. B. 258.
(2) 42 J. P. 406.
(3) [1892] 1 Q. B. 362.
(4) [1891] A. C. 173, at p. 184.
(5) But see now Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 27.

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take away this right if they know that the licensing justices have refused to renew the licence. In this we cannot agree, for, if so, what is the use of the appeal which is clearly given to the publican by s. 27 of the Act of 1828? Apart from the cases relied on by Mr. Asquith, in our judgment some evidence must be forthcoming to justify the court of quarter sessions in refusing the appellant a renewal of his licence.

Now, *Sharp* v. *Wakefield* (1), the first case relied upon by Mr. Asquith, no doubt decided that justices had a discretion to refuse the renewal of a licence, though that discretion was to be exercised judicially (not according to private opinion); and Lord Herschell (2) points out that the procedure provided by s. 42 of the Licensing Act, 1872, is still in force, and, subject to its provisions being complied with, the justices may exercise the discretion which the House of Lords held that they had. When the case of *Boulter* v. *Kent Justices* (3) is carefully read, it will be seen that it decided two things, and two things only—first, that a licensing meeting was not a court of summary jurisdiction, so that a court of quarter sessions, upon appeal by a publican thereto against the refusal of a licensing meeting to grant him a renewal of his licence, could not mulct an objector in costs, because it was only in cases of appeals from a court of "summary jurisdiction" that the court of quarter sessions had this jurisdiction, and a licensing meeting was not such a court; and, secondly, that an objector to the renewal of a licence was not a party to the proceedings. It is a mistake to say that this decision in any way decided that a court of quarter sessions was not a court with all the incidents of a court both as regards evidence and onus of proof. It did not touch this question at all; it left it just where it was before. What it did decide, as before stated, was that a licensing meeting was not a court of summary jurisdiction, and therefore the court of quarter sessions could not condemn an objector in costs, and that an objector was not a party to the proceedings. The third case cited by Mr. Asquith was that of *Tynemouth Corporation* v. *Attorney-General* (4), which decided that a borough fund with no

(1) [1891] A. C. 173.
(2) [1891] A. C. at pp. 185, 186.
(3) [1897] A. C. 556.
(4) [1899] A. C. 293.

surplus could not be charged with the costs incurred by the chief constable opposing an appeal to quarter sessions by a publican against the refusal of licensing justices to renew his licence. The decision, in our judgment, has no application to the present case; but there are two passages, one in the judgment of Lord Morris and the other in Lord Davey's judgment, which are pointed to by Mr. Asquith. Lord Morris says: "*Boulter* v. *Kent Justices* (1) appears to me to decide that the chief constable had no right to appear as a party"; and Lord Davey says that an objector "does not become a 'party' to the proceedings" and "has no right to appear and be heard on the appeal to quarter sessions," and that the only proper respondents are the licensing justices themselves, and if the objector be heard it is as amicus curiæ. How does this shew that a court of quarter sessions can refuse the renewal of a licence, or, as Lord Bramwell puts it, that the publican's licence could be taken from him, except upon evidence? In our judgment neither *Sharp* v. *Wakefield* (2), nor *Boulter* v. *Kent Justices* (1), nor *Tynemouth Corporation* v. *Attorney-General* (3), applies to the present case; and Lord Davey in the *Tynemouth Case* (3) certainly was not dealing with the question we have now to decide—namely, whether the court of quarter sessions can refuse the renewal of a licence without hearing any evidence at all. In our opinion it cannot do so. It follows, therefore, that the question which is left to us must be answered thus — that the court of quarter sessions was wrong and that the licence must be renewed. For the reasons above given this appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Belfrage & Co., for Chamberlain & Johnson, Llandudno.*

Solicitors for respondents: *Edwards & Cohen, for D. Owen & Griffith, Bangor.*

(1) [1897] A. C. 556. (2) [1891] A. C. 173.
(3) [1899] A. C. 293.

E. L.

1900
April 2.

BUXTON LIME FIRMS COMPANY, LIMITED *v.* HOWE.

Employer and Workman—Jurisdiction of Justices—Absence of Workman without Leave—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 4—*Truck Act*, 1896 (59 & 60 *Vict. c.* 44), *s.* 1.

The jurisdiction of a court of summary jurisdiction under the Employers and Workmen Act, 1875, to hear and determine a dispute under that Act between an employer and a workman is not ousted by reason of the agreement of service being one to which the provisions of s. 1 of the Truck Act, 1896, apply.

CASE stated by justices for the county of Derby, from which the following facts appeared.

A complaint had been preferred under the Employers and Workmen Act, 1875, by the appellants against the respondent, the particulars of claim annexed to and served with the summons being as follows: "The plaintiffs claim 5*s.* as a fine or penalty or alternatively by way of damages for that the defendant being a workman under a contract of service with the plaintiffs wrongfully absented himself from work on the 15th and 16th September, 1899, being 2*s.* 6*d.* for each of such days." The following facts were proved or admitted at the hearing.

On January 2, 1899, the respondent entered into the service of the appellants and was employed under an agreement signed by him. By the agreement the respondent agreed to serve the appellants in getting and breaking limestone for twelve months, the respondent being "subject to a fine, or penalty, or drawback of 2*s.* 6*d.* for each and every working day on which he shall be absent without leave, except in case of sickness." The appellants agreed to pay wages at a specified rate, and the agreement further provided that, "in the event of the breach of any of the conditions of this agreement on the part of the workman, then, and in every such case, it shall be lawful for the company to dismiss the workman without any notice or without being liable to make any payment by way of

damages or otherwise for dismissal without notice, but all wages earned shall be paid up to the time of such dismissal less any amount then due for fines, penalties, or drawbacks for absence as aforesaid, should the company insist thereon." A notice was posted up in the cabin in which the respondent had his meals, of which the following is a copy: "Whereas by rule 3 of the General Rules of the Buxton Lime Firms Co., Limited, every contract man employed by the company is bound to do a full day's work every working day except in case of illness or absence by leave And whereas also every contract man by the terms of his signed contract note is subject to a fine or penalty or drawback of two shillings and sixpence for each and every working day absent without leave except in case of sickness And whereas the loose observance of these conditions of employment has prejudicially affected the company in the carrying out of its contracts with customers and in other ways, Notice is hereby given to every workman that the rules and conditions subject to which he is engaged will henceforth be strictly enforced and any infringement of them will be considered a breach of contract and punishable accordingly."

On September 13, 1899, the respondent applied for leave of absence from his work on September 14, 15, and 16, and leave was granted for the 14th, but was refused for the 15th and 16th. When the respondent's application for leave of absence on the 15th and 16th was refused, he replied, "Then I shall take French leave"; and he accordingly absented himself from his employment on September 15 and 16 without the appellants' permission.

The respondent was employed to get stone to supply a stone crusher, and during his absence the crusher was at work and the stone which should have been supplied by the respondent was not crushed, with a consequent actual loss to the appellants of a larger sum than 2*s*. 6*d*. for each day he was absent.

The respondent continued in the employment of the appellants and received wages from them; but no demand was made upon him for any penalties under the agreement for so absenting himself from his employment or for damages

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consequent thereon until he received the particulars of claim attached to the summons.

It was admitted that other workmen were absent from the works on September 15 and 16, and that in some cases deductions for penalties were made from their wages, and that the amount was not deducted in the respondent's case because of his contumacy when asking for leave of absence and the desire on the part of the appellants to punish him for such contumacy by bringing him before the justices.

On behalf of the respondent it was contended—(1.) That the agreement brought the case within the Truck Act, 1896, and that no particulars in writing under s. 1, sub-s. 2 (*b*), of that Act had been given, and that such particulars were a condition precedent to the levying of a fine or penalty such as was claimed. (2.) That the appellants had their remedy for the respondent's misconduct in their own hands by deducting the penalties from his wages, as provided by the agreement. (3.) That the appellants' only remedy was by deducting the amount claimed from the respondent's wages after complying with the requirements of the Truck Act.

On behalf of the appellants it was contended—(1.) That if the case were governed by the Truck Act the service of claim in the form of particulars attached to the summons was sufficient notice for the purpose of the Act. (2.) That the case was not governed by the Truck Act. (3.) That the deduction from the respondent's wages was not obligatory.

The justices were of opinion—(1.) That the appellants by their agreement with the respondent had the remedy for the offence in their own hands, and that their proper course was to have deducted the penalty from the next payment of wages, as the appellants had done in similar cases. (2.) That the agreement came within the Truck Act, and that the proceedings to recover a penalty under it could only be brought after a strict compliance with the provisions of that Act. (3.) That s. 1, sub-s. 2 (*b*), of the Truck Act had not been complied with, and that the particulars of claim attached to the summons were not a compliance therewith. They accordingly dismissed the summons.

The question for the opinion of the Court was whether the justices were right in dismissing the summons on the grounds stated in the case.

Hextall, for the appellants. The case is not within the Truck Act, 1896. The object of that Act is to regulate the dealings of employers and workmen inter se where matters are settled without the intervention of the Court; it cannot be read into the proceedings before justices, its effect being to give the employer an alternative remedy which the employer can put in force without going to the court. If the circumstances of the case do bring it within the Truck Act, that Act does not take away by implication the jurisdiction conferred upon justices by the Employers and Workmen Act, 1875. [He cited *Clemson* v. *Hubbard*. (1)]

Herbert Jacobs, for the respondent, was called upon to argue. The case falls within the Truck Act, 1896, and the jurisdiction of justices under the Employers and Workmen Act, 1875, is taken away. Admitting that the requirements of s. 1, sub-s. 1, of the Truck Act have been complied with, that is insufficient. There has been no compliance with s. 1, sub-s. 2 (*b*), which provides that an employer is not to make any such deduction or to receive any such payment as is contemplated by sub-s. 1, "unless particulars in writing shewing the acts or omissions in respect of which the fine is imposed and the amount thereof are supplied to the workman on each occasion when a deduction or payment is made"; the expression "receive any such payment" includes taking proceedings to enforce payment. The particulars given on the complaint are not a compliance with the requirement. The appellants are not entitled to an order on their alternative claim for damages, for the special agreement for payment of a penalty precluded the appellants from enforcing such a claim; they have agreed that the damages shall be estimated in a particular way.

RIDLEY J. I think that the justices have come to a wrong decision in this case, and that the appeal should be allowed.

(1) (1876) 1 Ex. D. 179.

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Ridley J.

We have to consider the state of legislative enactment on the subject. In the first place, there is the Employers and Workmen Act, 1875, which expressly gives power to a court of summary jurisdiction to determine disputes between employers and workmen; the summons in the present case was taken out under that Act. Then the Truck Act, 1896, contains provisions as to contracts between employers and workmen containing any agreement under which deductions may be made from the wages to be paid, and the Act says that such contracts are not to be valid unless certain conditions are complied with; for instance, the terms are to be contained in a notice, which is to be put up in some place accessible to the workmen; there are other conditions, which, as I understand the facts, have been substantially complied with in the present case. It is provided in s. 1, sub-s. 2, that the employer shall not make any deduction from the wages unless such deduction is made in accordance with the terms of a contract, and unless particulars thereof are put in writing and delivered to the workman. These conditions were complied with in the present case, and I think that the justices have gone wrong in this way: they supposed that because the Truck Act, 1896, contained the provisions to which I have referred, it ousted the jurisdiction conferred upon justices by the Employers and Workmen Act, 1875, in cases where the contract fell within the Truck Act, 1896. In other words, they thought that the parties must make use of the Truck Act, 1896, in all cases where the contract contained a provision authorizing in certain events a deduction from the wages, and that if the employers did not comply with the requirements of s. 1, sub-s. 2, of that Act, they were left without a remedy. To justify such a construction, the words of the sub-section cannot be construed literally, and the word "receive" must have a wider interpretation than properly belongs to it. The Act was passed to prevent employers from taking matters into their own hands and making improper deductions from the wages due to the workman; but it was not intended in any way to interfere with the powers given to justices by the Employers and Workmen Act, 1875. Had that been intended by the Legislature, some provision to

that effect would certainly have been found in the Truck Act, 1896. I think that the fact found by justices, that the agreement came within the Truck Act, and that the proceedings to recover a penalty under it could only be brought after a strict compliance with the provisions of that Act, was wrong. It may be that the agreement comes within the Truck Act, 1896, and I incline to think that it does, but it does not follow that proceedings for the recovery of a penalty can only be taken after compliance with the requirement of that Act; that is contrary to my view of the statute. Then the justices went on to find that s. 1, sub-s. 2 (*b*), of the Truck Act, 1896, had not been complied with, and that the particulars of claim attached to the summons were not a compliance therewith, and therefore the claim for the penalty could not be enforced. I think that in so holding they arrived at an erroneous conclusion; they should have said that although the agreement was within the Truck Act, 1896, the dispute had arisen under the Employers and Workmen Act, 1875, and have proceeded to adjudicate upon it; practically they have not adjudicated upon the dispute at all.

Further, it was contended that the appellants were not entitled to recover damages from the respondent because a penalty for a breach of the agreement was provided in the agreement itself. I doubt whether that is the true construction of the statute, and I think that it is not; but I do not desire to give any decision upon that point. I think that the case should be sent back to the justices to determine under the Act of 1875.

DARLING J. I am of the same opinion. I look at the case in this way. Sect. 1 of the Truck Act, 1896, provides that an employer shall not make a contract with a workman for any deduction from his wages, or for any payment by the workman by way of a fine, unless certain specified conditions are observed. Now, here the employers and workmen entered into a contract which provided for the payment of a fine or penalty or for making a deduction from the wages, and therefore that contract would be bad in law if it did not comply with

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Darling J.

the requirements of the Truck Act, 1896. The workman did something which would have entitled the employer to a fine or penalty which he could have deducted from the wages, because the contract provides for such a deduction in the event of the workman absenting himself from his work without leave. The workman absented himself without leave, and thereupon the employers, instead of making a deduction, issued a summons before justices under the Act of 1875 for the recovery of 5*s.* as a fine or penalty, or in the alternative as damages.

It was argued that because the amount was a penalty under the Truck Act, 1896, it could not be recovered before justices upon a summons under the Act of 1875. The Truck Act provides that employers and workmen shall not make a contract except upon certain terms and conditions; those terms and conditions were in my judgment complied with in the present case, and the contract was, therefore, in my opinion good and binding on the parties to it. Sect. 1, sub-s. 1, was undoubtedly complied with. Sect. 1, sub-s. 2, says that "an employer shall not make any such deduction"—in the present case no deduction was made, so those words do not apply—"or receive any such payment"; as to these words, it was said that if the employer goes before the justices and gets a judgment in his favour and gets the proceeds of that judgment, he receives a payment, and must, therefore, comply with the remaining part of sub-s. 2, which prevents the employer from recovering "unless particulars in writing shewing the acts or omissions in respect of which the fine is imposed and the amount thereof are supplied to the workman on each occasion when a deduction or payment is made." But that argument does not seem to avail the respondent much, for the Act provides that the particulars are to be given when the payment is made, and, if recovery of the money is to be treated as payment under the Act, it follows that it is sufficient if the particulars were given when the payment is made, that is, when the employer gets the proceeds of the order of the justices. If the respondent's case is based upon that contention, it appears to me to be wholly wrong.

I should not be inclined to hold that, because in a contract of

this nature there is a provision for a penalty, the employer could not in law recover it by means of legal proceedings. A man might absent himself from his work at a time when his employer owed him nothing; for instance, his wages might be paid on Saturday, and he might stay away on the following Monday, Tuesday, and Wednesday; in such a case I should be sorry to hold that a master could not take legal proceedings for the recovery of the penalty mentioned in the contract. But that consideration would not conclude the present case, for there remains the alternative claim for damages. It was contended for the respondent that the employer had no right to recover damages upon such a summons; I cannot accede to that contention. The Truck Act does not deal with damages: it deals with fines and payments in respect of fines; and neither under that Act nor under the contract has the master given up his right to claim damages for the loss occasioned to him by reason of the workman's nonfeasance. I think the justices were misled by not noticing that the Truck Act applied certain conditions to the making of a good contract; even if the parties tried to make a contract, but only succeeded in making a bad one, they would not, in my opinion, give up their rights under the Employers and Workmen Act, 1875; nor do they give them up if they make a contract which complies with the conditions of the Truck Act, 1896. I agree, therefore, that this case must go back to the justices.

Appeal allowed.

Solicitors for appellants: *Cree & Son, for Sidney Taylor, Buxton.*

Solicitors for respondent: *Steadman & Van Praagh, for Arthur Neal, Sheffield.*

W. J. B.

C. A.

1900

April 5.

[IN THE COURT OF APPEAL.]

WRIGHT *v.* JOHN BAGNALL & SONS, LIMITED.

Employer and Workman—Compensation—Time for making Claim—Claim made more than Six Months after Accident—Employers debarred from raising Objection—Estoppel—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-s.* 1.

The provision of s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, which requires the claim for compensation to be made within six months of the occurrence of the accident causing the injury, is not necessarily an absolute bar to proceedings for the assessment of compensation commenced after six months by an injured workman, and the county court judge or other arbitrator has jurisdiction to inquire whether there are any circumstances in the case to debar the employer from raising that defence. An agreement arrived at between the parties shortly after the accident that there is a statutory liability on the employer to pay compensation, the amount of compensation being left open for future settlement, is evidence upon which the judge or arbitrator may properly find that the employer is estopped from setting up the defence that the request for arbitration was not filed within six months of the accident.

APPEAL from a refusal to award compensation under the Workmen's Compensation Act, 1897, on an application to the deputy judge of the Walsall County Court.

The appellant, George Wright, was a wagoner in the employment of the respondents, and on November 23, 1898, he received personal injuries arising out of and in the course of his employment. He was in the receipt of wages at the rate of 21*s.* a week. On November 26 the appellant's wife was told by the respondents' ledger clerk to bring a certificate from the hospital as to her husband's condition in three weeks' time, "when he would be due for compensation," and she would receive half his wages; at the end of the three weeks she went to the works and received 10*s.* 6*d.*, and this sum the appellant or his wife continued to receive weekly until September, 1899, either from the respondents or from the insurance company with whom they were insured against claims for compensation under the Act. About Easter, 1899, negotiations commenced

between the appellant and the respondents' manager with regard to a commutation of the weekly payments for a lump sum, the latter offering 15*l.*, and the former asking for 200*l.*; upon one occasion on which the matter was discussed the manager said that if the appellant talked about 200*l.* the respondents would go to the Court about it. At Whitsuntide, 1899, the manager offered 30*l.*, saying that he thought the insurance company would give that amount; but the appellant declined to take that sum, and no agreement was ever arrived at. On September 6, 1899, the weekly payments ceased, and in October, 1899, the appellant filed a request for arbitration in the Walsall County Court. The respondents in their answer took the objection that the proceedings were out of time, the claim for compensation not having been made within six months from the date of the accident, as required by s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897. The deputy county court judge held that "the claim for compensation" in s. 2, sub-s. 1, meant the filing of the request for arbitration, and that therefore, apart from any question of waiver or estoppel, the proceedings were out of time. As to the question of waiver, he found that the weekly payments by the respondents to the appellant of the maximum sum to which he was entitled under the Act, coupled with the fact that they commenced at the time when compensation under the Act became due, were calculated to make the appellant believe that he was receiving those payments under the Act, and to lull him into a state of false security; but he was of opinion that the appellant ought to have known his rights under the Act, and, if he thought that an arrangement had been come to with the respondents, should have had its terms embodied in a memorandum and have had the memorandum registered under the Act. He was of opinion that the respondents had not waived their right to object to the proceedings as being out of time. As to the question of estoppel, he was of opinion that the language of s. 2, sub-s. 1, that proceedings "shall not be maintainable" unless the claim for compensation is made within six months, was peremptory, and that the conduct of the respondents could not operate as an estoppel against their setting up the appellant's non-compliance with

C. A. 1900

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the absolute requirements of the section. He therefore held that the appellant was not entitled to compensation, and made an award in favour of the respondents. The applicant appealed.

Disturnal, for the appellant. It is admitted that the deputy county court judge was right in holding that the filing of the request for arbitration was "the claim for compensation" within the meaning of s. 2, sub-s. 1, of the Act: *Powell* v. *Main Colliery Co.* (1); but he has held as a matter of law that the six months' limitation is absolute, and that it is not competent for the appellant to shew that the respondents have debarred themselves from taking the objection; in so doing he has misdirected himself. The right to compensation is given in s. 1 of the Act, and that right is not barred by the limitation of time contained in s. 2, sub-s. 1, which, like the statute 21 Jac. 1, c. 16, s. 3, affects the remedy only and does not bar the right. The provision as to the six months' limitation is not absolute and may be waived. The previous conduct of the respondents was such as to debar them from setting up the defence that the proceedings were out of time. There was evidence which entitled the deputy county court judge to find that the payments were intended to be payments under the Act by persons liable under the Act to pay compensation to the appellant; they were payments of the statutory maximum amount, and commenced at the time when an employer liable under the Act would be liable to make the first payment. Although there may have been no definite concluded agreement between the parties, there was an intention on the part of the respondents, indicated at the time to the appellant, to treat the payments as made in respect of a liability under the Act, and in equity they are estopped from taking the objection that the proceedings are out of time: *Ramsden* v. *Dyson.* (2) Further, at a later period the respondents discussed the question of capitalisation of the weekly payments, treating them as payments made under the Act.

Craies, for the respondents. Neither the facts nor the law justify the appellant's contention. The statute gives a right

(1) Ante, p. 145. (2) (1866) L. R. 1 H. L. 129.

which previously did not exist; it is immaterial that the right is conferred by one section and the six months' limitation is to be found in another; the whole of the sections should be read together, and the right given by s. 1 is subject to the limitation of time imposed by s. 2. There was no evidence of any waiver on the part of the respondents. The respondents were not in a position to do anything towards a waiver of their right to rely on the statutory limitation until proceedings had been taken by the appellant, for the ordinary way of waiving such a right is by not taking the objection at the proper time in the pleadings: *East India Co.* v. *Paul* (1); here the respondents took the objection at the proper time in their answer.

[ROMER L.J. referred to *Supple* v. *Cann.* (2)]

The only other way in which a defence under a statute of limitations can be waived is by a concluded agreement not to set it up; a mere promise not to do so is insufficient where the remedy is statute-barred: *Maddison* v. *Alderson.* (3) There can be no estoppel against setting up a right given by statute: Maxwell on the Interpretation of Statutes, 3rd ed. p. 543; *Britain* v. *Rossiter.* (4)

Disturnal, in reply, cited *Johnston* v. *Shaw.* (5)

COLLINS L.J. This is an appeal by a workman upon an application under the Workmen's Compensation Act, 1897, from the decision of the deputy county court judge of Walsall, who has found, as I read his judgment, that, the plea of the statutory limitation having been raised by the respondents, it was not competent for him in point of law to consider whether there were any circumstances in the case which debarred the respondents from raising that defence. He decided that the "claim for compensation" required by s. 2, sub-s. 1, of the Act to be made within six months after the accident meant the filing of the request for arbitration. This point was raised in *Powell* v. *Main Colliery Co.* (6), and decided by a majority of this Court since the hearing of this case in the county court,

(1) (1849) 7 Moo. P. C. 85.
(2) (1858) 9 Ir. C. L. R. 1.
(3) (1883) 8 App. Cas. 467.
(4) (1879) 11 Q. B. D. 123.
(5) (1883) 21 Sc. L. R. 246.
(6) Ante, p. 145.

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and the correctness of the decision of the judge on that point is not disputed. I think, however, that under the circumstances the decision of the judge on the point that I first mentioned was wrong in law. It seems to me that there was evidence at the hearing in the county court fit to be considered by the judge, and that the judge himself in effect found, that the parties had agreed that there was a statutory liability on the respondents to pay compensation, and that each of them had reserved the right to go to the Court to have the amount determined. Weekly payments were made to the appellant; but there was an argument as to the amount at which the weekly payments should be commuted, and the respondents' manager or foreman said, as appears by the evidence, that if the appellant stood out for so large an amount as 200*l.* they would have to go to the Court. The workman and the masters thereupon forebore to take steps to have the amount assessed, and during the period in which they were negotiating the six months' limit of time ran out. In that state of things there was ample evidence of an agreement that compensation was to be paid, the only question left open being that of amount. If that is the case, the respondents are debarred from raising the point that the statutory limitation applied. In my opinion they have also debarred themselves from raising this point by treating the matter as open to negotiation during the whole time in which they were paying the appellant, and, having allowed the six months to expire while the negotiations were still proceeding, they cannot then turn round and say that the time for claiming compensation has gone by. In my opinion there is ample evidence on which the county court judge might find that the respondents are not entitled to raise the defence of the lapse of the six months, and there is nothing in point of law to prevent him from so finding. The case must therefore go back.

VAUGHAN WILLIAMS L.J. I agree. I think that the result of the evidence is that there was an agreement that the respondents were to be liable to pay compensation, and that if the parties could not agree as to the amount they must go to

the Court to have it determined. I think the lapse of time cannot be set up as a bar to the claim.

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ROMER L.J. I agree.

Appeal allowed.

Solicitor for appellant: *J. Mitchell, for Willcock & Taylor, Wolverhampton.*

Solicitors for respondents: *Morgan, Price & Mewburn, for Hargreave & Heaton, Birmingham.*

A. M.
W. J. B.

[IN THE COURT OF APPEAL.]

C. A. 1900 *May* 5.

RENDALL *v.* HILL'S DRY DOCKS AND ENGINEERING COMPANY, LIMITED.

Employer and Workman—Compensation — Time for making Claim—Claim made more than Six Months after Accident—Estoppel—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-s.* 1.

A workman having been injured by an accident, his employers paid him weekly through an insurance company one-half the amount of his wages, taking a receipt which expressed that the money was received "on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897"; the payments continued to be made for ten months after the accident, when they ceased. The workman then filed a request for arbitration in the county court:—

Held, that, there being no evidence of any admission on the part of the employers of their liability under the Act to pay compensation, they were not estopped from taking the objection that the request for arbitration was out of time.

Wright v. *Bagnall*, ante, p. 240, distinguished.

APPEAL from a decision of the judge of the Cardiff County Court in an application under the Workmen's Compensation Act, 1897.

The respondent, a shipwright in the employment of the appellants, met with an accident on December 19, 1898, in the course of his employment causing serious injury to the brain. The appellants were insured against claims under the Act, and upon the occurrence of the accident their manager

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sent to the insurance company particulars of the accident, in which he returned the respondent's wages at 2*l.* a week. A month after the accident an agent of the insurance company called upon the respondent and handed him 1*l.*, taking a receipt from him in the following form: "Received of the Hill's Dry Docks and Engineering Company, Limited, per the British Employers' Mutual Accident Indemnity Association, Limited, the sum of 1*l.* on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897, in respect of the accident which occurred to me on the 19th day of December, 1898." A similar payment was made, and a similar receipt taken, weekly until October 28, 1899, when the payments ceased. The respondent then filed a request for arbitration. No notice of the accident had been sent by or on behalf of the respondent to the appellants, nor had any claim for compensation been made by him or on his behalf before the request for arbitration was filed. At the hearing in the county court the appellants objected that the proceedings were out of time, as the request for arbitration had been filed more than six months after the accident, and cited *Bennett* v. *Wordie & Co.* (1) The county court judge held that a claim for compensation under the Act did not mean only an application for arbitration; he further held that if, having regard to the defence of the appellants, it was open to them to object that the weekly receipts signed by the respondent were not claims for compensation, such receipts were either claims for compensation or were evidence that a claim had been made, and that the appellants, by taking such receipts and paying the weekly sums therein mentioned, either waived a claim for compensation or were estopped from taking their objection. He therefore made an award of 18*s.* a week in favour of the respondent.

The employers appealed.

Montague Lush (*Albert Parsons* with him), for the appellants. There was no evidence on which the county court judge could properly find a waiver by the appellants of their right to rely on the statutory limitation, and the fact that payments had

(1) (1899) 1 F. 855; 36 Sc. L. R. 643.

been made and receipts taken by them was no evidence of a claim for compensation having been made by the respondent. The case of *Wright* v. *Bagnall* (1) is not in point; the employers had in that case admitted their liability to pay compensation and had negotiated as to the amount, and this Court held that there was evidence on which the county court judge might properly find a waiver, he having held that in law there could be no waiver by the employers of their right to rely on an absolute statutory limitation. In the present case there has been no agreement as to liability, and no negotiations, and the respondent's position has not been altered by anything done by the appellants. The form of receipt is in the appellants' favour; it contains no admission of liability to pay compensation, and merely amounts to an agreement that, if a claim under the Act is ever made and enforced, credit is to be given for these payments.

Bailhache, for the respondent. The appellants cannot rely on the fact that no notice of accident had been given to them, they having waived it by themselves giving notice of accident to the insurance company. They are estopped from setting up the defence that the claim for compensation was not made within six months, for they are within the rule as to estoppel laid down in *Carr* v. *London and North Western Ry. Co.* (2), where one of the propositions laid down is that "if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented." Here a critical examination of the language of the receipt and of its legal effect might shew that it was so drawn as to avoid an admission of liability; but the facts shew that the appellants so conducted themselves as to lead a reasonable man in the respondent's position to believe that their liability was admitted. The fact that the payments were made by the insurance company was some evidence of an

(1) Ante, p. 240. (2) (1875) L. R. 10 C. P. 307.

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admission of liability, and the respondent would have been acting unreasonably if he had taken proceedings for having the compensation assessed while the payments were being regularly made. The case is not to be distinguished from *Wright* v. *Bagnall*. (1)

A. L. SMITH L.J. In this case, which comes before us on appeal from an award in favour of the respondent, the accident by which he was disabled took place on December 19, 1898; and the respondent was not in a position to prove at the hearing that any notice of the accident or of intention to claim compensation was ever given to the appellants. It is admitted that the respondent never made a claim for compensation, in the sense of a claim initiating proceedings before the arbitrating tribunal, within six months of the accident. I have said before, and I say it again, that reading through the whole of this Act, the only provisions in favour of the master are that the request for arbitration proceedings, which is called a claim for compensation, must be made within six months, and that notice of the accident must be given as soon as practicable. Neither of these requirements was fulfilled in the present case. How, then, does the respondent endeavour to make good his claim? He relies upon the recent decision of this Court in *Wright* v. *Bagnall* (1), for apart from that decision it is impossible for him to get rid of the prohibition in the Act against the initiation of proceedings more than six months after the accident. But before looking into that case let us consider the facts of the case before us. Suppose that the appellants had not been insured against accidents to their men, and it had been proved that they had paid the respondent 1*l.* a week. Would that fact be any evidence of a waiver on their part of the claim for compensation being made within six months? Undoubtedly, the mere fact that such payments had been made would not be evidence of waiver. Here the appellants were insured, and what happened was this: Athough they had received no notice of accident or of intention to claim compensation, they sent to the insurance office particulars of the accident, in which they said that the man's

(1) Ante, p. 240.

wages were 2*l.* a week; the maximum compensation under the Act would be 1*l.* What did the insurance company do on receiving these particulars? They did not leave the respondent without any money to go on with; they paid him 1*l.* a week on account of any compensation that might be or become due to him; in doing so they stood in the shoes of the employers, for whom they paid the money. Reading the receipt which was taken by the insurance company, I cannot see that there is any difference whether this money was paid by the company or by the employers; on the face of it it purports to be a receipt for money paid by the employers per the insurance company. Do these circumstances shew a waiver of the six months' limitation, or amount to an estoppel against setting up that defence? Clearly they do not. The case of *Wright* v. *Bagnall* (1) has been referred to. What was the ratio decidendi in that case? There the claim for compensation had not been made within six months of the accident, and the county court judge held, as my brother Collins says, that the parties had agreed that there was a statutory liability on the respondents to pay compensation, and that each of them had reserved the right to go to the Court to have the amount determined. My brother Vaughan Williams seems also, during the argument, to have said what was exactly to the same effect. Where is there any evidence in the present case that the parties agreed that there was a liability on the part of the employers to pay compensation? I can see no evidence of any such agreement. I am therefore of opinion that the arbitration proceedings were not started in time, and that this appeal must be allowed.

VAUGHAN WILLIAMS L.J. and ROMER L.J. concurred.

Appeal allowed.

Solicitors for appellants: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for respondent: *Riddell, Vaisey & Smith, for Meyrick & Davies, Cardiff.*

(1) Ante, p. 240.

W. J. B.

C. A.
1900
May 5.

[IN THE COURT OF APPEAL.]

DANIEL *v.* OCEAN COAL COMPANY.

Employer and Workman — Compensation — Proceedings by Legal Personal Representative of Workman — Investment for Benefit of Dependants — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clauses* 4, 5, 6, 7.

Where an application for compensation under the Workmen's Compensation Act, 1897, is made by the legal personal representative of a deceased workman on behalf of himself and other dependants of the workman, the county court judge or other arbitrator has jurisdiction under Sched. I., clauses 4–7, to order so much of the compensation as is allotted to the dependants to be paid to the county court registrar for investment in his name on their behalf, and is not compelled to order it to be paid to the legal personal representative.

APPEAL from a decision of the judge of the Pontypridd County Court upon an application under the Workmen's Compensation Act, 1897.

The appellant was the widow of a workman who had met with a fatal accident while in the employment of the respondents; she had taken out letters of administration of the estate of her deceased husband, and had filed a request for arbitration as his legal personal representative on behalf of herself and her two sons. At the hearing the county court judge made an award of 246*l.* 7*s.*, of which he apportioned 146*l.* 7*s.* to or for the benefit of the appellant and 100*l.* to or for the benefit of the two sons in equal shares. He further ordered the respondents to pay the 146*l.* 7*s.* to the appellant for her own use, and to pay the 100*l.* apportioned to or for the benefit of the sons to the registrar of the court to be invested by him in his name in the Post Office Savings Bank for the benefit of the sons, the interest arising from such investment to be from time to time until further order paid to the appellant to be by her applied for the maintenance, education, or benefit of her sons. The widow appealed against so much of the order as directed the 100*l.* to be paid to the registrar for investment.

Cripps, Q.C. (*Rhys Williams* with him), for the appellant. The county court judge had no power to order the compensation allotted to the sons to be paid to the registrar for investment; the appellant, as the legal personal representative of her deceased husband, was entitled to have the whole sum allotted as compensation paid to herself. The case is within clause 4 (1), and not within clause 6, of the First Schedule to the Act. It is clear under clause 4 that where the application is made by the legal personal representative the compensation awarded is to be paid to him, and this is not affected by clause 6, which gives power to order the investment of compensation allotted to a dependant. Clause 6 only applies to cases where there is no legal personal representative, and the concluding paragraph of clause 4 shews that the legal personal representative is a trustee for the dependants to whom compensation is allotted.

Ruegg, Q.C., and *Bertram*, for the respondents, did not argue.

A. L. SMITH L.J. I think that the question raised by this appeal is perfectly clear. In my opinion the right way of dealing with clauses 4, 5, 6, and 7 of the First Schedule is to read them all together, and not to read clause 4 by itself. That clause standing alone probably justifies payment of the whole of the compensation to the legal personal representative, and

(1) By Sched. I., clause 4, of the Workmen's Compensation Act, 1897, "The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependants or other person entitled thereto under this Act."

By clause 5, "Any question as to who is a dependant, or as to the amount payable to each dependant, shall, in default of agreement, be settled by arbitration under this Act."

By clause 6, "The sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator."

By clause 7, "Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar."

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so far supports the appellant's contention. But we cannot stop there. Clause 5 provides for settling by arbitration questions as to who are dependants and as to the amount payable to each dependant, and clause 6 provides that the compensation allotted to a dependant may be invested for his benefit as ordered by the arbitrator: that is what has been done in this case. Then under clause 7 any sum ordered to be invested may be invested in the registrar's name in the Post Office Savings Bank. Reading all these clauses together, I am clearly of opinion that the learned county court judge had jurisdiction to make this order. The appeal must be dismissed, but without costs, as the respondents had no interest in the matter, and need not have appeared in response to the notice served upon them.

VAUGHAN WILLIAMS and ROMER L.JJ. agreed.

Appeal dismissed.

Solicitors for appellant: *Walter Morgan, Bruce & Nicholas, Pontypridd.*

Solicitor for respondents: *H. P. Becher, for Vazie Simons, Pontypridd.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1900
March 17.

KNOWLES & SONS, LIMITED *v.* BOLTON CORPORATION.

Arbitration—Award—Extension of Time for making Award—Jurisdiction of Court or Judge—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 9, 24—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 180, *sub-s.* 9.

Sect. 180, sub-s. 9, of the Public Health Act, 1875, which enacts that the time for making an award by arbitrators or an umpire under that Act shall not in any case be extended beyond the period of two months from the date of the submission to arbitration or the date of the reference of the matters to the umpire respectively, deals only with the power of the arbitrators or umpire to extend the time, and does not affect the jurisdiction of the Court. Under s. 9 of the Arbitration Act, 1889, the Court or a judge has jurisdiction to extend the time for making an award under the Public Health Act, 1875, although the time for making the award has expired.

In re Mackenzie and Ascot Gas Co., (1886) 17 Q. B. D. 114, overruled.

Warburton v. *Haslingden Local Board*, (1879) 48 L. J. (Q.B.) 451, approved.

APPEAL from the refusal of Kennedy J. at chambers to extend the time for making an award under the Public Health Act, 1875.

It appeared that the corporation of Bolton had made a sewer which ran through the appellants' premises, and that the question of the damage suffered by the appellants had been referred to arbitration under the provisions of the Public Health Act, 1875. On October 27, 1897, the appellants appointed their arbitrator, the respondents appointing theirs on April 12, 1899; on May 25 the arbitrators appointed an umpire, and on May 31 the arbitrators gave notice to the umpire that they were unable to agree. The umpire appointed July 19 as the day for proceeding with the reference; on that day the arbitrators were present, and the arbitrator for the respondents insisted on the umpire viewing the premises; a view was accordingly arranged for, and took place on August 12. On September 5 the umpire made his award, giving the

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appellants 40*l.* compensation. On September 26 the town clerk pointed out that the award was out of time, and on November 24 the respondents decided to refuse to pay the compensation awarded. An application was then made to a master at chambers to extend the time for making the award, but was refused by him on the authority of *In re Mackenzie and Ascot Gas Co.* (1), and his decision was affirmed by Kennedy J. on the authority of the same case.

Danckwerts, Q.C., and *Horridge*, for the appellants. The judge had jurisdiction to extend the time for making the award. The jurisdiction is given by s. 9 of the Arbitration Act, 1889, which is not inconsistent with s. 180, sub-s. 9, of the Public Health Act, 1875, and therefore applies by virtue of s. 24 to this arbitration. (2) The true view of s. 180, sub-s. 9, of the Public Health Act is that the time there limited for making the award is not to be extended by the umpire, and that the sub-section does not affect the discretionary power of the Court or a judge to extend the time. Under s. 15 of the Common Law Procedure Act, 1854 (since superseded by s. 9 of the Arbitration Act, 1889), the Court had power to enlarge the time for making an award. In *Lord v. Lee* (3) an award was made out of time, and it was held that a judge had power to enlarge the time after the award was made, the effect of the

(1) 17 Q. B. D. 114.

(2) By 52 & 53 Vict. c. 49 (The Arbitration Act, 1889), s. 9, "The time for making an award may from time to time be enlarged by order of the Court or a judge, whether the time for making the award has expired or not."

By s. 24, "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorized or recognised by that Act."

By 38 & 39 Vict. c. 55 (The Public Health Act, 1875), s. 180, "With respect to arbitrations under this Act, the following regulations shall be observed; (that is to say) . . . . (9.) The time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission, and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him."

(3) (1868) L. R. 3 Q. B. 404.

enlargement being to ratify that which had been previously done by the arbitrator without authority; this decision was approved and acted on in *May* v. *Harcourt*. (1) It is true that in *Kellett* v. *Tranmere Local Board* (2) it was held that the Court had no power under the Common Law Procedure Act, 1854, to extend the time for making an award under the Public Health Act, 1848, but that decision was dissented from in *Warburton* v. *Haslingden Local Board* (3), where it was held that a reference to arbitration of a question of disputed compensation pursuant to s. 180 of the Public Health Act, 1875, was a submission to arbitration by consent within the meaning of the Common Law Procedure Act, 1854, and that the Court could at any time, even after the making of the award, remit the award to the arbitrator for reconsideration. In view of the fact that the Court considered the propriety of extending the time, but declined in the exercise of their discretion to do so, *Warburton* v. *Haslingden Local Board* (3) is a clear authority that the time limited for making the award may be extended by the Court. This case was not cited to the Divisional Court in *In re Mackenzie and Ascot Gas Co.* (4), and that decision was wrong and should be overruled. In *In re Yeadon Local Board and Yeadon Waterworks Co.* (5), the construction put by the Court of Appeal on s. 180, sub-s. 9, of the Public Health Act is more consistent with the decision in *Warburton* v. *Haslingden Local Board* (3) than with *In re Mackenzie and Ascot Gas Co.* (4) The effect of s. 24 of the Arbitration Act is to apply s. 9 of that Act to arbitrations under the Public Health Act unless it is inconsistent with that Act, and there is no inconsistency between the two. Looking at the provisions in the various sub-sections of s. 180 of the Public Health Act, sub-s. 9 is clearly confined to the enlargement of time by the arbitrators or umpire, and the time limit there imposed for the making of the award does not impose any fetter on the jurisdiction of the Court.

[They also cited *Holdsworth* v. *Wilson*. (6)]

(1) (1884) 13 Q. B. D. 688.
(2) (1864) 34 L. J. (Q.B.) 87.
(3) 48 L. J. (Q.B.) 451.
(4) 17 Q. B. D. 114.
(5) (1889) 41 Ch. D. 52.
(6) (1863) 4 B. & S. 1.

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Cripps, Q.C. (*Buckmaster* with him), for the respondents. There is no jurisdiction in the Court or a judge to extend the time for making an award under the Public Health Act, 1875. Sect. 180, sub-s. 9, of that Act amounts to an express statutory prohibition against the time being extended "in any case" beyond the period of two months from the date of the reference to the umpire; the appellants cannot read the words "by the umpire" into the sub-section. Such a statutory limited time is inconsistent with the jurisdiction of the Court to extend the time under s. 9 of the Arbitration Act, and therefore under s. 24 of that Act the provisions of the Act as to extending the time do not apply to arbitrations under the Public Health Act. The point was not raised or decided in *Warburton* v. *Haslingden Local Board* (1), which was only a decision as to the jurisdiction of the Court to remit an award under the Public Health Act for reconsideration. The precise point was raised in *In re Mackenzie and Ascot Gas Co.* (2), and that decision is correct and should be followed.

A. L. SMITH L.J. This is an appeal from a refusal of Kennedy J. at chambers to extend the time for making an award, leave to appeal having been given by the learned judge. The facts of the case lie in a small compass. The corporation of Bolton took a sewer through property belonging to the appellants, to which they caused certain damage by the execution of the work; to assess the amount of damage it was necessary to have recourse to arbitration under the Public Health Act, 1875. Each of the parties appointed an arbitrator, and the arbitrators, being unable to agree, appointed an umpire. The umpire appointed a day for proceeding with the reference, and, the corporation insisting on his having a view of the premises, a view subsequently took place, and the umpire made an award of 40*l.* in favour of the appellants. The corporation having refused to pay the money, the appellants took proceedings to enforce the award, but were met by an objection taken by the corporation that the award was out of time; thereupon they made this application at chambers, which both

(1) 48 L. J. (Q.B.) 451. (2) 17 Q. B. D. 114.

Kennedy J. and the master held that they had no power to grant.

The question for us is whether under these circumstances there is power in the Court or a judge to enlarge the time for making this award. Apart from the interpretation which has to be placed upon s. 180, sub-s. 9, of the Public Health Act, 1875, there cannot be a doubt that they have that power notwithstanding that the time for making an award has expired; even before the Arbitration Act this was held to be the law in *Lord* v. *Lee* (1), a decision upon s. 15 of the Common Law Procedure Act, 1854, in which case Blackburn J. said: "I feel no doubt that, under the clause in the section which says that 'it shall be lawful for the Court or a judge, for good cause, from time to time, to enlarge the time for making the award,' the judge may at any time give such further time to the arbitrator to make his award as he shall think fit under the circumstances"; while Lush J. said: "No limit of time is given within which the judge may enlarge the time, and he is not limited to the time within which the arbitrator himself could enlarge it, even although it be said in the submission that the arbitrator shall make his award on or before a certain day." There cannot, therefore, be a doubt, apart from the operation of s. 180, that there was jurisdiction in the Court or a judge to make the order asked for, although the time for making the award had elapsed before the application was made at chambers, and although the award has been in fact made.

Now it is clear from *Warburton* v. *Haslingden Local Board* (2) that an arbitration under the Public Health Act, 1875, is an arbitration by consent within the meaning of the Common Law Procedure Act, 1854, which latter Act is now superseded, so far as regards arbitrations, by the Arbitration Act, 1889. But it is said that by reason of s. 180, sub-s. 9, of the Public Health Act a fetter is imposed upon the power of the Court or a judge, and that they have not as extensive a jurisdiction as they would otherwise have. But, upon consideration of that sub-section, I do not find that the Court is

(1) L. R. 3 Q. B. 404. (2) 48 L. J. (Q.B.) 451.

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in any way fettered; there is no allusion made in it to the Court or a judge. When that Act was passed the jurisdiction of the Court or a judge in these matters must be taken to have been known to the Legislature, and there is no mention made of their jurisdiction in the section. Reading through s. 180, I find that in all its numerous sub-sections it is dealing with arbitrators and umpires, and with no one else; and when we come to sub-s. 9, the Legislature enacts that "The time for making an award by arbitrators under this Act shall not in any case be extended beyond the period of two months from the date of the submission"; that clearly means that the time cannot be extended by the arbitrators. Then the sub-section goes on: "and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him"; the umpire therefore cannot, any more than the arbitrators, extend the time beyond two months from the date of his acquiring seisin of the proceedings. But how does this affect the jurisdiction of the Court or a judge? They had jurisdiction before to extend the time, and I cannot read the sub-section in any such way as is contended for by the respondents. It is said that there is an indication that the jurisdiction has been taken away, and cases have been cited for and against that view. The case of *Warburton* v. *Haslingden Local Board* (1) is favourable to the construction which I am putting upon the sub-section, but *In re Mackenzie and Ascot Gas Co.* (2) undoubtedly is at variance with it; it is to be observed, however, that in the latter case the former decision was not cited; the Court seems to have held the view by reason of the words that the time should "in no case" be extended beyond the two months. I do not agree with that decision, and I think that it was wrong. I agree with the view taken by the Court in *Warburton* v. *Haslingden Local Board.* (1) Upon the circumstances of this particular case, I have no doubt whatever as to the way in which the discretion of the Court should be exercised, and I think that the appeal should be allowed and the time for making this award extended.

(1) 48 L. J. (Q.B.) 451. (2) 17 Q. B. D. 114.

ROMER L.J. I agree. The question for our decision comes to the Court of Appeal for the first time; but there are two conflicting decisions in the Divisional Court: *Warburton* v. *Haslingden Local Board* (1) and *In re Mackenzie and Ascot Gas Co.* (2) I think the former of these decisions is correct, and will state very shortly the grounds for my opinion. I agree with my Lord that s. 180, sub-s. 9, of the Public Health Act does not deal with the powers of the Court as to the enlargement of the time for making an award at all. When we look at s. 180, it is significant to observe how the sub-sections are introduced; they are prefaced by the words, "With respect to arbitrations under this Act, the following regulations shall be observed." All the sub-sections, therefore, are merely regulations, and reading through them they are obviously regulations for controlling the conduct of arbitrators and umpires and of the parties to arbitrations; they do not in any way control or cut down the powers of the Court. When we come to sub-s. 9, we find that it follows immediately on sub-s. 8, which deals with the determination of matters by the umpire in cases where the arbitrators have failed to make their award within twenty-one days, or within a time duly extended by them; and I think that sub-s. 9, in fixing the extreme limit of two months, is also dealing with an extension of time by the arbitrators or umpire, as the case may be. The reasoning of the Court of Appeal in *In re Yeadon Local Board and Yeadon Waterworks Co.* (3), in my opinion, supports this view. Sub-sect. 9, therefore, was only intended to deal with an extension of time by the arbitrators or umpire, and was not intended to interfere in any way with the powers of the Court. No doubt, in exercising its discretion as to the enlargement of time, the Court should bear in mind the provisions of sub-s. 9; but in a proper case the Court will exercise its discretionary power of enlarging the time beyond the two months. In the present case I cannot entertain the slightest doubt that we ought to exercise our discretion in favour of extending the time. Kennedy J. at chambers thought that he was bound by *In re Mackenzie and Ascot Gas Co.* (2), and did not go into the question of

(1) 48 L. J. (Q.B.) 451. (2) 17 Q. B. D. 114.
(3) 41 Ch. D. 52.

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discretion. We are, therefore, not reviewing his discretion in allowing this appeal.

Appeal allowed.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Fullagar & Hulton, Bolton.*

Solicitors for defendants: *Holt-Beever & Co, for Hinnell, Bolton.*

W. J. B.

1900
May 3, 4.

[IN THE COMMERCIAL COURT.]

ANDERSON & CO. *v.* BEARD.

Principal and Agent—Stock Exchange—Default of Broker—Liability of Client to Jobber—Privity of Contract.

The defendant employed a broker to purchase for him certain shares on the Stock Exchange, and afterwards directed him to "carry over" the shares to the next account. The broker, in accordance with the regulations of the Stock Exchange, purchased the shares in his own name from the plaintiffs, who were jobbers on the Stock Exchange, and afterwards carried over with them the same shares. The defendant's name was not disclosed. Before the next settling day the broker was declared a defaulter on the Stock Exchange, and in accordance with the rules of that body his contract with the plaintiffs was closed, and the plaintiffs took back the shares at a price fixed by the official assignee of the Stock Exchange and known as the "hammer price." The plaintiffs having ascertained that the broker was acting for the defendant in this transaction called upon him to take up the shares. He declined to accept any responsibility for them; and the plaintiffs thereupon at once sold the shares for the best price then obtainable, and sued the defendant for the difference between the price at which the shares had been carried over and that at which they had sold them:—

Held, that the defendant was liable for this amount, and not merely for the difference between the price at which the shares were carried over and the "hammer price."

Dictum of Kennedy J. in *Beckhuson* v. *Hamblet*, ante, p. 18, followed and approved.

ACTION tried before Mathew J. in the Commercial Court.

The plaintiffs were stock and share dealers and members of the London Stock Exchange.

On November 28, 1899, the defendant instructed a Mr. C. R. Beasley, who was a stockbroker and a member of the London Stock Exchange, to purchase for him on the Stock Exchange

200 East Rand Extension shares. Pursuant to these instructions, Beasley purchased 200 East Rand Extension shares from the plaintiffs at the price of 2*l.* 17*s.* 6*d.* per share.

On December 11, 1899, the defendant instructed Beasley to procure a carrying over of the shares to the end of December account; and Beasley on the same day effected the carrying over by first selling the shares to and then buying them back from the plaintiffs at the making-up price of the mid-December account, which was 2*l.* 10*s.* per share. Beasley thus became liable to the plaintiffs for 500*l.*, the price of the shares, and also for 2*l.* 9*s.* 4*d.* for contango for fifteen days at the agreed rate of 12 per cent. per annum on this purchase-money.

On December 14, 1899, Beasley was declared a defaulter on the Stock Exchange, and in accordance with the rules and regulations of the Stock Exchange his transaction with the plaintiffs was closed by the official assignee of the Stock Exchange, the price of the shares being fixed by the official assignee at 2*l.* per share, at which price they were taken back by the plaintiffs. The plaintiffs then ascertained from Beasley the name of the defendant, and called upon him to say what course he intended to pursue with regard to the 200 East Rand Extension shares. The defendant asked for time to consider the position, and ultimately on December 21 he wrote stating that he was unable to recognise the plaintiffs' right to call upon him to take up the shares, and declining all responsibility in the matter. The plaintiffs accordingly on December 22 sold the shares for the best price then obtainable, which was 1*l.* 7*s.* 6*d.* per share, and brought this action to recover 227*l.* 9*s.* 4*d.*, being made up of 225*l.*, the difference between the price of the shares on December 11 and December 22, and 2*l.* 9*s.* 4*d.* contango. The settling day for the end of December account was December 29. The defendant in his defence alleged that if he was liable at all he was only liable for the difference between the price at which the shares were carried over and the "hammer price" of the shares—that is to say, the price at which Beasley's account in respect of the shares was closed by the official assignee on his becoming a defaulter. He therefore, while denying all liability, paid into court the

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sum of 102*l.* 9*s.* 4*d.*, and said that that was sufficient to satisfy the plaintiffs' claim.

Rufus Isaacs, Q.C., and *Spencer Bower*, for the plaintiffs. The defendant having repudiated the contract, the plaintiffs were justified in at once selling the shares at the best price which they could obtain. The case is really governed by the decision in *Beckhuson* v. *Hamblet.* (1)

Herbert Reed, Q.C., and *Norman Craig*, for the defendant. In *Beckhuson* v. *Hamblet* (1) Kennedy J. expressed an opinion, which was not necessary to the decision, that in such a case there was privity of contract between the dealer and the client on the default of the broker. That opinion would, however, be probably treated as binding in this Court. But the point was not taken in *Beckhuson* v. *Hamblet* (1) that, assuming privity of contract to exist, the utmost that could be recovered by the dealers would be the difference between the price at which these shares were carried over and the "hammer price." When the official receiver has closed the transactions of a defaulting broker his contracts cease to be in existence, and can only be revived by the exercise by the client of the option given him by the customs of the Stock Exchange. That option is given to him for his own benefit and not for that of the dealers, and if he does not choose to exercise it they have no power to compel him to do so, and he can only be liable for the difference between the price at which the shares have been bought for him by the broker and the "hammer price."

There was no such repudiation of the contract by the defendant as would entitle the plaintiffs to regard the contract (if any contract existed between them) as rescinded. The plaintiffs, therefore, were wrong in selling the shares on December 22, but should have waited till the settling day on December 29.

[They cited *Duncan* v. *Hill* (2); *Ex parte Grant, In re Plumbly* (3); *Hartas* v. *Ribbons.* (4)]

Spencer Bower, replied.

Cur. adv. vult.

(1) Ante, p. 18.
(2) (1873) L. R. 8 Ex. 242.
(3) (1880) 13 Ch. D. 667.
(4) (1889) 22 Q. B. D. 254.

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May 4. MATHEW J. delivered the following judgment:—This was an action brought to recover damages for the refusal of the defendant to take delivery and pay for certain shares, which it was alleged had been bought by him from the plaintiffs. The plaintiffs were dealers in shares on the London Stock Exchange, and on November 28, 1899, the defendant instructed Mr. Beasley, who was a broker, and also a member of the Stock Exchange, to purchase for him the shares in question. They were 200 East Rand Extension shares. These instructions were followed, and 200 East Rand Extension shares—no more and no less—were purchased of the plaintiffs by Mr. Beasley. The purchase was for the mid-December account, and on December 11, before the settling day, the shares, on the instructions of the defendant to Beasley, were carried over by the plaintiffs to the end of December account. On December 14 Beasley became a defaulter and ceased, in accordance with the rules and regulations of the Stock Exchange, to be a member of the House. Upon that the usual process of liquidation followed—a course which was the subject of evidence in the case of *Ex parte Grant, In re Plumbly* (1), and in several other cases with which the Courts have had to deal. The accounts opened between Beasley and the different dealers were closed at what was called "the hammer price," that is to say, at a price ascertained in accordance with the rules and regulations of the Stock Exchange, and the differences which Beasley would have been entitled to receive on the transactions were set against the differences for which he was liable. It seems to me that that process of liquidation has no operation outside the Stock Exchange. The regulations were not intended to affect and do not affect the public outside the House. As between Beasley and the plaintiffs this transaction, with other transactions that he had entered into, was closed on or about December 14. When that occurrence took place the plaintiffs, in accordance with the usual course of business of the Stock Exchange, applied to Beasley for the name of his principal in respect to this transaction, and they were furnished by him with the name of the defendant. Thereupon one of the firm

(1) 13 Ch. D. 667.

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called upon the defendant, and ultimately had an interview with him. At that interview the defendant asked for time to consider what course he should take. Now, in accordance with the course of business, as I understand, there were three courses open to him. He might either have said at once that he would take the shares in accordance with his contract. If he had done that the matter, for the time at any rate, would have been satisfactorily settled. He might, on the other hand, have appointed another broker to take the place of the defaulter and to carry on the transaction. Or he might have been content to treat the matter as closed at "the hammer price," and the transaction so closed would have involved him in a liability to the extent of about 100*l.* He took none of these courses. Time was given him in the expectation that he would act in the ordinary way, and adopt one or other of them. He gave no intimation of what he proposed to do. After a considerable interval the plaintiffs received an intimation from him that he did not consider himself responsible in respect of the transaction, and that he repudiated any liability to them in respect of the shares.

Upon that they treated the contract as being at an end, and sold the shares. The market had in the meanwhile gone down, and the loss upon the transaction amounted to 227*l.* 9*s.* 4*d.*, for which sum this action is brought.

The first point taken in the argument for the defendant was this: that the sale was made in accordance with the usages and the usual course of business on the Stock Exchange, and that in accordance with those usages and that course of business the transaction had been closed by the default of Beasley, and that the utmost liability that could be imposed on the defendant would be the difference arrived at by the "hammer price" of the shares. Why should that be so? It is a most unreasonable conclusion to come to. There is no trace in the rules of the Stock Exchange of any such intention, and I do not think that the committee of that institution when they made the rule ever contemplated the possibility of such a rule binding the outside public. Shares are often bought on the Stock Exchange for the purposes of investment; and why in

reason and good sense should such transactions be closed and the client called upon, it may be, to pay differences merely because his broker between the purchase and settling day has become a defaulter? There appears to me to be no reason whatever for coming to any such conclusion, and no evidence to justify it. But then it was said, why should the shares be kept open after the settlement at the "hammer price"? The answer to that is the evidence which has been given in this and in many other similar cases of the perfectly reasonable and sensible course of business which follows on a default, namely, that the dealer is entitled to ascertain the name of the client from the defaulting broker, and to find out from that client what course he proposes to take, treating the contract as a subsisting contract, and giving the buyer the option of taking one or other of the three courses—each of them sensible and practicable—to which I have already referred. That shews to my mind clearly that the contract was kept alive, and the only question left is as to what damages are to be paid in the event of the buyer ultimately failing, as he did here, to take up the shares. Now what happened subsequently in this case was this. As I have said, for a time the plaintiffs were left in doubt whether the defendant would take up the shares or not. It has been argued that there was no obligation upon him to exercise any option, and that if he chose to hold his hand he could merely be made responsible for the loss on the sale at the "hammer price." But the evidence to which I have referred clearly shews the obligation on the buyer to say what he is going to do. Instead of choosing any of the courses open to him, the defendant, after taking time to consider the question, intimated to the plaintiffs that he did not consider himself in any way responsible in regard to the transaction. That intimation, as I think, entitled the plaintiffs to rescind the contract then and there. He repudiated his liability, and they were entitled to treat that repudiation as a rescission and to deal with the shares. Of course they had to think of themselves. The market was going down and was a very precarious market at the best, and they took the only reasonable course, and sold the shares at once at a loss of 227*l.* 9*s.* 4*d.* I

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see no reason why they should not have judgment for that amount.

At the outset of the case it was intimated by counsel for the defendant that something might possibly be said on the question whether there was any privity of contract between the plaintiffs and the defendant; but I was not asked to differ from the opinion—and I should not differ from the opinion—expressed on that point by Kennedy J. in the recent case of *Beckhuson* v. *Hamblet*. (1) He held in that case that in a similar transaction there was privity between the dealer and the customer. There was no such difficulty in this case as ultimately presented itself in *Beckhuson* v. *Hamblet* (1), where it appeared that the broker had unfortunately bought a large parcel of shares, out of which he intended to appropriate a certain number to the particular transaction. Kennedy J. held in that case, in accordance with the decision in *Mollett* v. *Robinson* (2), that this course of dealing was fatal to the plaintiffs' claim, but on the question of privity he expressed an opinion—not necessary, no doubt, for the ultimate decision of the case—in which I entirely concur. On the evidence before me I myself, having regard to the course of business, can come to no other conclusion than that this contract was binding as between the plaintiffs and the defendant, and established the relation of seller and buyer respectively between them.

I do not refer to the cases that were cited in the argument because the evidence given in this case entirely supported the statements made in those cases as to the course of dealing on the Stock Exchange.

I therefore give judgment for the plaintiffs for the amount of the claim.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Morley, Shirreff & Co.*

Solicitors for defendant: *Edwards & Cohen.*

(1) Ante, p. 18.

(2) (1870) L. R. 5 C. P. 646; (1872) L. R. 7 C. P. 84; (1875) L. R. 7 H. L. 802.

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1900
May 18.

GENTLE *v.* FAULKNER.

Landlord and Tenant — Forfeiture — Covenant not to Assign — Equitable Assignment—Declaration of Trust—Condition against Assignment for Benefit of Creditors—"Disposing of the Land leased"—Notice before Action —Service on "Lessee"—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 4—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 6 (i.); *s.* 67, *sub-s.* 2.

By a lease the lessee covenanted not to assign or underlet the demised premises without the consent of the lessor, and there was a proviso for re-entry on breach of any of the covenants, or if the lessee should (inter alia) execute an assignment for the benefit of his creditors. The lessee executed an assignment of all his real and personal property, except that of a leasehold tenure, to a trustee for the benefit of his creditors, and he declared that he would stand possessed of all his leasehold property upon trust for the trustee and to assign and dispose of the same in such manner as the trustee should direct for the purposes of the deed. The trustee entered into possession of the demised premises, but no legal assignment of them was executed. The lessor served upon the trustee a notice alleging as ground of forfeiture the execution by the lessee of the assignment. In an action against the lessee to recover possession of the premises:—

Held, that, as there had been no legal assignment of the premises, there had been no breach of the covenant against assignment:

Held, also, that the condition against assignment for the benefit of creditors was not a condition against disposing of the land leased within the meaning of s. 14, sub-s. 6 (i.), of the Conveyancing and Law of Property Act, 1881, and therefore service of notice on the lessee under s. 14, sub-s. 1, was necessary before the lessor could enforce his right of re-entry; and that service of the notice on the trustee under the deed was not a sufficient compliance with the provisions of s. 14, sub-s. 1, and s. 67, sub-s. 2, of the Act.

A condition against the disposing of the land leased within the meaning of s. 14, sub-s. 6 (i.), of the Conveyancing and Law of Property Act, 1881, means a condition which on its face is against the disposing of the land leased.

APPEAL from the judgment of Ridley J. at the trial of the action without a jury.

The action was brought to recover possession of a house and

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shop at St. Albans, held under an indenture of lease dated December 6, 1897.

By the lease the plaintiff demised the house and shop to the defendant, who carried on business as a grocer, for a term of twenty-one years from December 25, 1897, and the defendant covenanted (inter alia) that he would "not (except by will) assign or underlet the said demised premises or any part thereof without the consent in writing of the lessor first had and obtained, such consent not to be unreasonably withheld in the case of a respectable and responsible tenant." Then followed a proviso that "if and whenever there shall be any breach or non-observance of any of the lessee's covenants hereinbefore contained, or if and whenever the lessee shall become bankrupt or have a receiving order made against him either on his own or a creditor's petition, or shall execute an assignment for the benefit of his creditors or any of them, or shall enter into any arrangement to pay a composition to his creditors or any of them, then and in any of the said cases it shall be lawful for the lessor at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole to re-enter and the same to have again, repossess, and enjoy as in his former estate."

By an indenture dated January 6, 1899, the defendant, as beneficial owner, conveyed and assigned to one Keen, as trustee, all his freehold, copyhold, and other lands, estates, tenements, hereditaments, and premises (save and except such as were of a leasehold tenure), and all his other estate and effects, real and personal, including debts, to hold the same upon trust to collect or sell and dispose of the same, and out of the moneys to be received, after paying the costs and expenses, to pay, so far as the same might extend, rateably to the creditors of the defendant the several debts due to them respectively, in like manner as if the defendant had been adjudged bankrupt; and the defendant declared that "he will stand possessed of all leasehold property of or to which he is now possessed or entitled upon trust for the said trustee, and to assign and dispose of the same in such manner as the said trustee should from time to time direct for the purposes of

these presents." By the deed the defendant appointed the trustee his attorney to ask, demand, sue for, recover, and receive all debts and sums of money owing to the defendant, and all other the premises thereby conveyed and assigned, and on payment or delivery thereof or of any part thereof to sign, seal, and execute receipts or discharges for the same, and on non-payment or non-delivery thereof to commence and prosecute any action, suit, or other proceedings whatsoever for recovering and compelling the delivery or payment thereof; and also to adjust, liquidate, and finally settle all accounts, dealings, and transactions whatsoever relating to the trust estate and premises, and for all or any of the purposes aforesaid to use the defendant's name; and whatsoever the said attorney should lawfully do or cause to be done in the premises the defendant thereby covenanted with the trustee to allow, ratify, and confirm. There was a clause in the deed empowering the trustee, if he thought fit, instead of immediately realizing the business, to carry it on with a view to the sale and realization of the property assigned by the deed, and to employ the defendant to manage and carry on the business on such terms as he might see fit. The schedule to the deed contained the names of the creditors who executed it, with the amount of the debts owing to each opposite his name.

Keen, as trustee under the deed, entered into possession of the premises, but no legal assignment thereof was executed by the defendant. On January 27, 1899, the plaintiff sent by post a letter addressed to Keen at his office in London, giving him notice of forfeiture by reason of the execution by the defendant of the assignment of January 6, 1899, for the benefit of his creditors. On February 1, 1899, the writ in the action was issued claiming possession.

Ridley J. held that the declaration of trust of the leasehold property in the deed of assignment, followed by the taking of possession, was, by virtue of s. 24, sub-s. 4, of the Judicature Act, 1873, an assignment of the demised premises, and was a breach of the covenant in the lease not to assign; and that by virtue of s. 14, sub-s. 6 (i.), of the Conveyancing Act, 1881, the plaintiff was entitled to enforce his right of re-entry for breach

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of the covenant without giving notice under s. 14, sub-s. 1, of the Act. (1) He accordingly gave judgment for the plaintiff.

The defendant appealed.

J. G. Witt, Q.C., and *F. N. Keen*, for the defendant. There was in this case no breach of the covenant not to assign the demised premises. The declaration of trust did not amount to an assignment within the meaning of that covenant. It is clear that such a covenant contemplates a legal assignment. The plaintiff cannot rely upon a forfeiture based upon a breach of the condition against an assignment for the benefit of creditors, because no notice has been served in pursuance of the Conveyancing Act, 1881, s. 14, sub-s. 1. Judgment, therefore, ought to have been entered for the defendant.

H. Tindal Atkinson and *T. H. Carson*, for the plaintiff. An equitable assignment by a declaration of trust of the whole beneficial interest in the premises, coupled with a parting with the possession of them, amounts to an assignment within the meaning of the covenant not to assign the demised premises. Since the Judicature Act, 1873, every Court must give effect to the assignment in equity: *Walsh* v. *Lonsdale*. (2) In *Richards* v. *Crawshay* (3), the Divisional Court thought that an equitable assignment by a declaration of trust was a breach of a covenant not to assign the demised premises. The lessor wants the protection of the covenant, whether the assignment be legal or equitable. This case is not like those cases in

(1) 44 & 45 Vict. c. 41, s. 14, sub-s. 1: "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action, or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of . . . ."

Sub-s. 6: "This section does not extend—

"(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest."

Sect. 67: "(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient although only addressed to the lessee or mortgagor by that designation without his name, or generally to the persons interested without any name . . . ."

(2) (1882) 21 Ch. D. 9.

(3) (1892) 8 Times L. R. 446.

which it was decided that an equitable assignee of a lease, even though he has been let into possession, is not liable in equity to the lessor on the covenants in the lease: *Cox* v. *Bishop* (1); *Ramage* v. *Womack*. (2) The ground of those decisions was that there was no privity of contract between the lessor and the assignee. On a similar ground it was decided by Romer J. in *Friary Holroyd & Healey's Breweries, Limited* v. *Singleton* (3) that the equitable assignee of a lease, although in possession of the premises and paying the rent, was not entitled to the benefit of an option to purchase given to the lessee and his "assigns." (4) The principle of those cases does not apply to a forfeiture for breach of a covenant against assignment. Secondly, the plaintiff is entitled to re-enter for breach of the condition against an assignment for the benefit of creditors. The deed executed by the defendant clearly comes within that condition, and no notice was necessary under s. 14, sub-s. 1, of the Conveyancing Act, 1881, as the case falls within sub-s. 6 (i.) of that section. That sub-section excepts the case of a condition against the disposing of the land leased from the operation of the section. A proviso for re-entry necessarily implies a condition: see Conveyancing Act, 1881, s. 10. A condition against assignment for the benefit of creditors falls within the words of s. 14, sub-s. 6 (i.), "a condition against disposing of the land leased." It is not necessary, in order to bring the case within sub-s. 6 (i.), that the covenant or condition should on its face be one against disposing of the land leased. It is sufficient if the deed of assignment for the benefit of creditors, in its ordinary meaning, does in fact dispose of the land leased. A deed such as the one in this case is, in ordinary legal parlance, a conveyance or assignment by the debtor of his property, including his leaseholds, to a trustee for the benefit of his creditors: *In re Hughes, Ex parte Hughes*. (5) There was therefore, by reason of the assignment for the benefit of creditors, a disposing of the land leased, and notice of the

(1) (1857) 8 D. M. & G. 815.
(2) [1900] 1 Q. B. 116.
(3) [1899] 1 Ch. 86.
(4) The judgment was reversed on appeal on the facts: see [1899] 2 Ch. 261.
(5) [1893] 1 Q. B. 595, at p. 601.

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breach was not necessary before enforcing the right of re-entry.

[They also cited upon this point: *In re Walker, Ex parte Gould* (1); *In re Spackman, Ex parte Foley*. (2)]

Thirdly, if notice under s. 14 of the Conveyancing Act, 1881, was necessary, notice was served in accordance with that section. The notice was addressed to and served on Keen, who was the equitable assignee of the term, and who had taken possession of the premises. Though the legal estate remained in the defendant, the entire benefit of the lease passed to Keen. He was the only person interested in it. By s. 67, sub-s. 2, of the Conveyancing Act, 1881, any notice required by the Act to be served on a lessee may be addressed to the "persons interested" without any name. The object of s. 67 is to give the person interested notice, so that he may be able to protect his interest against the forfeiture. Keen being the only "person interested," the notice was properly addressed to him, and the fact that the notice was addressed to him by name cannot make it invalid. The notice was, therefore, properly served. Further, under the power of attorney contained in the deed of assignment, Keen was authorized to receive the notice on behalf of the defendant. The notice was, therefore, served on the defendant through his attorney.

J. G. Witt, Q.C., in reply. With regard to the breach of the condition against the execution of an assignment for the benefit of creditors, the plaintiff cannot enforce the right of re-entry for that breach without having served the notice required by s. 14, sub-s. 1, of the Conveyancing Act of 1881. Sub-s. 6 (i.) does not apply. That sub-section only applies to a covenant or condition which upon its face is against the assigning, underletting, parting with the possession, or disposing of the land leased. It does not apply to a covenant or condition against that which may or may not, according to the particular deed, dispose of the land leased. An assignment for the benefit of creditors may or may not dispose of the land leased.

(1) (1884) 13 Q. B. D. 454. (2) (1890) 24 Q. B. D. 728.

Sub-s. 6 (i.) does not apply to a covenant against an assignment of that kind. The covenant in the lease not to assign or underlet the demised premises deals with the disposal of the leasehold premises; the subsequent conditions, among which comes an assignment for the benefit of creditors, all have relation to the insolvency of the lessee, and do not deal with the disposal of the land leased. If sub-s. 6 (i.) applies to an assignment for the benefit of creditors, the lessee in such a case will be worse off than if he were made bankrupt, because in the former case he cannot get any relief, as s. 14, on the hypothesis, does not apply, whereas in the latter case s. 2, sub-s. 2, of the Conveyancing Act, 1892, makes s. 14 applicable within one year from the date of the bankruptcy, and relief can be granted within the year. Notice, therefore, had to be served on the "lessee" under s. 14, sub-s. 1. The "lessee" is defined in s. 14, sub-s. 3. Keen, upon whom alone the notice was served, does not come within that definition. Sect. 67 only authorizes the service of a notice on the lessee by serving "the persons interested." The person legally entitled is the person interested. He alone can apply for relief, and the object of the notice is to enable the person receiving it to apply for relief. The lessee was not served either by name or as the person interested. The plaintiff, therefore, cannot enforce the right of re-entry for breach of the condition against an assignment for the benefit of creditors.

A. L. SMITH L.J. This is an appeal from my brother Ridley in an action of ejectment by a landlord against his tenant founded upon an alleged forfeiture for breach of covenant. The first ground of forfeiture alleged is that the tenant has broken the covenant in the lease not to assign the demised premises. The covenant by the lessee is not to assign or underlet the premises or any part thereof without the consent in writing of the lessor first had and obtained, such consent not to be unreasonably withheld in the case of a respectable and responsible tenant. The covenant does not relate to the parting with the possession of the demised premises, but simply

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to the assigning or underletting of them. It is not said that the defendant has underlet the premises; it is said that he has assigned them. What, then, is the meaning of a covenant not to assign the demised premises? In my judgment the meaning is not to execute a legal assignment. An equitable assignment is not sufficient to operate as a breach of the covenant. There must be an assignment at law. In the present case the defendant on January 6, 1899, made an assignment for the benefit of his creditors. By the deed he assigned to a trustee all his freehold, copyhold, and other lands, estates, tenements, hereditaments, and premises, save and except such as were of a leasehold tenure, and as regards his leasehold property he declared that he would stand possessed of it upon trust for the trustee and to assign and dispose of the same in such manner as the trustee should from time to time direct. My brother Ridley has held that that is a breach of the covenant not to assign the demised premises. He says that, though before the Judicature Act, 1873, the declaration of trust would not have been a breach of the covenant, yet it is so now because, the trustee having taken possession and all the benefit of the deed having passed, the old Court of Chancery would have ordered the defendant to carry out the assignment, and this Court must now recognise that right in the trustee and that duty in the defendant; and that being so, there was an assignment of the leaseholds. I cannot agree with that reasoning. I do not see how it can be said that a deed which says that the defendant assigns all his property except leaseholds is a breach of a covenant not to assign the leaseholds. The defendant in effect says that he will not assign the leaseholds. The defendant has only made a declaration of trust as regards them. The reasons for having a declaration of trust of the leaseholds instead of a legal assignment of them are stated in the judgment of Lindley L.J. in *In re Hughes, Ex parte Hughes.* (1) My brother Ridley seems to me to have misapplied s. 24, sub-s. 4, of the Judicature Act, 1873. That sub-section says that the Courts shall recognise and take notice

(1) [1893] 1 Q. B. 595.

of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of the Act. I fail to see how that provision converts a non-legal assignment into a legal one. It seems to me to do nothing of the kind. The plaintiff, therefore, has failed to prove that there has been any assignment within the meaning of the covenant in the lease not to assign the demised premises. There has, therefore, been no breach of that covenant, and that alleged ground of forfeiture does not exist.

It was next said that a ground of forfeiture exists by reason of the condition in the lease giving a right of re-entry if and whenever the lessee shall execute an assignment for the benefit of his creditors or any of them. It is clear that the defendant has executed an assignment for the benefit of his creditors or some of them. The plaintiff claims to re-enter. The defendant's answer to that is that the plaintiff has not served notice upon him as required by s. 14, sub-s. 1, of the Conveyancing Act, 1881. The plaintiff in reply says that sub-s. 6 (i.) of s. 14 takes the case out of sub-s. 1, and no notice is necessary. The plaintiff contends that the condition against executing an assignment for the benefit of creditors is a condition against "disposing of the land leased" within the meaning of that sub-section. I do not think that contention well founded. One must remember that the effect of sub-s. 6, which takes a certain class of covenants out of the beneficial operation of s. 14, is to debar the lessee from obtaining relief under that section against forfeiture for breach of any of those covenants. In my opinion the first part of sub-s. 6 (i.) only applies to a covenant or condition which upon its face is an absolute covenant or condition against assigning or disposing of the land leased. An assignment for the benefit of creditors may or may not, according to its form, include a disposal of the land leased. A condition against an assignment for the benefit of creditors is inserted in a lease for quite a different object from that with which a covenant against the disposal of the

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land leased is inserted. The plaintiff, therefore, has not made out that this condition against assignment for the benefit of creditors comes within sub-s. 6 (i.). It is, therefore, not taken out of s. 14, and the plaintiff must, before proceeding to enforce the right of re-entry, serve notice under that section.

That brings me to the last point. Upon whom has the plaintiff to serve the notice? By s. 14, sub-s. 1, he must serve "on the lessee" a notice specifying the particular breach complained of. The plaintiff did not serve any notice on the defendant. He says, however, that he has served the proper person under s. 67, sub-s. 2, of the Act. That sub-section provides that any notice required or authorized by the Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation without his name, or generally to the persons interested without any name. I assume that the notice in the present case was sufficient in point of form. It was, however, not served on the defendant; it was served on Keen, who was the trustee under the deed of assignment, and had the equitable estate in him. In my opinion the defendant as lessee was clearly the person interested, and he ought to have been served with the notice. It was then said that Keen, under the power of attorney in the deed of assignment, was agent for the defendant to receive the notice, and that, therefore, the service of the notice upon Keen was good service on the defendant. I do not think so. The power of attorney gives Keen no authority to receive the notice on behalf of the defendant.

For these reasons I think that the appeal should be allowed, and judgment entered for the defendant.

VAUGHAN WILLIAMS L.J. I agree.

ROMER L.J. I am of the same opinion. Upon the first point, it seems to me to be clear that a covenant in a lease against assigning the demised premises, in the absence of any context shewing that the covenant is to have an extended meaning, covers only a legal assignment. The covenant

against assignment is, therefore, not broken by anything short of a legal assignment. In my opinion such a covenant is not broken by the lessee executing a declaration of trust of the demised premises. With all respect to my brother Ridley, s. 24, sub-s. 4, of the Judicature Act, 1873, has no application to the present case. Before the Judicature Act the Court of Chancery would never have regarded the cestui que trust as a lessee for the purposes of the lease as between the lessor and the lessee, nor would the Court have regarded a declaration of trust by the lessee of the demised premises as a breach of the lessee's covenant against assignment.

Upon the second point I have felt more doubt. The point seems to me to be one of some difficulty. I have come to the conclusion that the view stated by my Lord is the correct view. I cannot think that, when fairly read, a condition against the execution by a person of an assignment for the benefit of his creditors or any of them can be called a condition against disposing of the land leased within the meaning of s. 14, sub-s. 6 (i.), of the Conveyancing Act, 1881. I do not think that such a condition as that was intended to be covered by the provisions of the sub-section. The condition in this lease as to an assignment for the benefit of creditors does not upon its face refer to the land leased. An assignment for the benefit of creditors may or may not deal with the land leased. When one looks at sub-s. 6 (i.) of s. 14 one sees that it deals with two groups of covenants and conditions. The first group contains those covenants and conditions which are well known in leases, dealing with express disposals of the land leased, namely, the assigning, underletting, parting with the possession, or disposing of the land leased. The second part of the sub-section deals with another group or class of conditions, namely, conditions with reference to the solvency of the lessee. They are conditions for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest. We find in this lease instances of both classes of covenants and conditions. We have covenants against the disposal of the land leased, and also conditions relating to the solvency of the lessee. The first class of covenant in the lease, which

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corresponds with the first class in the sub-section, is so framed as to be limited to an assignment or underletting of the demised premises, and, as I have said, does not cover the particular disposition which has been made in this case. The second class in the lease, which corresponds with the second class in the sub-section, is more extensive in the lease than in the sub-section. I think that the condition of re-entry upon the execution by the lessee of an assignment for the benefit of his creditors is one of those which fall clearly within the second class, and not within the first, and is so placed in the lease. As has been said by my Lord, a covenant against assignment for the benefit of creditors is inserted for a different object from that with which the covenants enumerated in the first part of the sub-section are inserted. In no true sense, dealing with the sub-section fairly and remembering that the words used in the sub-section only give a short general description of a class of well-known covenants and conditions, can it be said that a condition against an assignment for the benefit of creditors is a condition against the disposing of the land leased. Therefore, upon this point we must hold that the case does not fall within the exceptions enumerated in sub-s. 6 (i.) of s. 14, and notice is required under sub-s. 1 of s. 14 before proceedings can be taken to enforce the right of re-entry.

There remains the question whether notice has been given in this case. For the reasons already stated by my Lord the service of the notice upon the trustee under the deed was not a sufficient compliance with the section. The defendant as lessee is the person interested in the lease, not only onerously, but also beneficially, because in the first place he is interested in the resulting trust, and in the second place as trustee of the leaseholds he would be entitled to retain the lease as an indemnity against any breach of covenant. The defendant is, therefore, the person interested, and notice ought to have been served upon him. It is a little remarkable that he is the only defendant in the action, and yet it is said that he is not a person interested.

For these reasons I think that all the points taken on behalf

of the plaintiff fail, and that the judgment of the learned judge must be reversed.

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Appeal allowed.

Solicitors for plaintiff: *Robbins, Billing & Co., for M. T. Hodding, St. Albans.*

Solicitors for defendant: *Hannay & Reynolds.*

A. M.

SHERRARD *v.* GASCOIGNE.

1900 *May* 30.

Landlord and Tenant—Ground Game—Right given to Occupier—Agreement to Alienate—Advantage in Consideration of Forbearing to Exercise—Agreement to leave Game unshot—Claim for Compensation—Ground Game Act, 1880 (43 & 44 *Vict. c.* 47), *s.* 3.

A statement of claim alleged that the plaintiff became tenant to the defendant of a farm, induced by a promise that, if the plaintiff left the ground game unshot for the defendant's benefit, the defendant would compensate the plaintiff for damage done to the plaintiff's crops by the ground game; that the plaintiff allowed the ground game to go unshot, and the defendant shot over the farm; and the growing crops of the plaintiff were damaged by the ground game, and the plaintiff claimed compensation.

The defendant pleaded that the agreement was void in law by reason of the Ground Game Act, 1880, s. 3, and the statement of claim disclosed no cause of action.

On argument of the point raised on the pleadings:—

Held, that the agreement purported to alienate the right given by the Act to the occupier to kill and take the ground game, and purported to give the occupier an advantage in consideration of his forbearing to exercise his right, within the meaning of s. 3, and was therefore void, and the plaintiff was not entitled to recover.

ARGUMENT of a point of law raised on the pleadings.

The statement of claim alleged that in 1898 the plaintiff became tenant to the defendant of two farms, the property of the defendant; that the tenancy was negotiated between the plaintiff and the estate agent of the defendant, and the agent represented to the plaintiff that the defendant was devoted to shooting, and with a view to induce the plaintiff to leave the ground game on the farms unshot and undisturbed for the

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defendant's benefit the agent promised that in the event of the plaintiff so doing the defendant would compensate the plaintiff for all damage done to the plaintiff's crops by the ground game; that the plaintiff was induced by the promise to accept the tenancy, and during the year 1898, in reliance upon and induced by the promise, allowed the ground game on the farms to go unshot and undisturbed for the benefit of the defendant, who ultimately shot over the farms; and the growing crops of the plaintiff on the farms were damaged and injured by the ground game, and the plaintiff claimed compensation.

Paragraph 6 of the defence was in the following terms:—

"The defendant will contend that if the promise alleged by the plaintiff was made, and if the agreement or arrangement purporting to have been made between the plaintiff and the agent with respect to the ground game was entered into, the promise and the agreement or arrangement by reason of s. 3 of the Ground Game Act, 1880 (43 & 44 Vict. c. 47) was and is void in law, and that the statement of claim discloses no cause of action."

The material clauses of the Ground Game Act, 1880 (43 & 44 Vict. c. 47), are set out in the judgment of Darling J.

Scott Fox, Q.C. (*H. T. Kemp* with him), for the defendant. The agreement alleged in the statement of claim discloses no cause of action. It is an agreement which purports to alienate the right of the occupier to kill and take the ground game as given him by the Ground Game Act, 1880, within the meaning of s. 3 of that Act. It is also an agreement which gives to the occupier an advantage in consideration of his forbearing to exercise his right, within the meaning of the same section, the advantage being the compensation agreed to be paid by the defendant. The words of s. 1 are positive and clear: "shall have, as incident to and inseparable from his occupation." [He referred to *Anderson* v. *Vicary*. (1)]

Cecil Walsh, for the plaintiff. This is not an agreement giving the occupier an advantage in consideration of his

(1) [1899] 2 Q. B. 436; (C. A.) post, p. 287.

forbearing to exercise his right. It is merely an agreement by the landlord to give compensation for damage occasioned by reason of his exercise of a right reserved to him under the agreement.

[DARLING J. It comes to this: "You shall shoot the ground game, and I will not."]

There might never have been any damage done by the ground game, and in that case the agreement would have given the occupier no advantage. [He referred to *Stanton* v. *Brown*. (1)]

Scott Fox, Q.C., replied.

DARLING J. The question in this case arises on a point of law raised on the pleadings according to the procedure which has taken the place of demurrer. By the Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 1, "Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land." By s. 3 of the same Act, "Every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void." Now what is alleged here? The statement of claim alleges that the defendant's agent, with a view to induce the plaintiff to leave the ground game on the farms unshot and undisturbed for the defendant's benefit, promised that in the event of the plaintiff so doing the defendant would compensate the plaintiff for all damage done to the plaintiff's crops by the ground game. The agreement here stated purports to alienate the right to kill and take the ground game, for by it the tenant agrees to leave the ground game unshot in consideration of the compensation which he is to get for damage done to his crops in consequence of his doing so. The statement of claim then

(1) [1900] 1 Q. B. 671.

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Darling J.

goes on to allege that the plaintiff, induced by the agent's promise, allowed the ground game to go unshot and undisturbed for the benefit of the defendant, who shot over the farms, and the growing crops of the plaintiff were damaged by the ground game. In my opinion it is perfectly clear that the agreement there alleged is an agreement which purports to alienate the right of the plaintiff to kill and take the ground game, which is given to him by the Act. It purports also to give the plaintiff an advantage in consideration of his forbearing to exercise his right, within the meaning of s. 3. The agreement therefore is absolutely void, and no claim under it can be enforced. The landlord has no right to kill and take the ground game unless by agreement; but by the express terms of the Act the tenant cannot give the right to the landlord to the exclusion of the right given by the Act to the tenant, and this is what the agreement here alleged purports to do.

BUCKNILL J. concurred.

Judgment for the defendant.

Solicitors for plaintiff: *North & Sons, Leeds.*
Solicitors for defendant: *Perkins & Perkins, York.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1900
May 25.

HOGARTH *v.* WALKER.

Insurance (Marine)—Policy on Ship—What included under term "Furniture."

Where a ship was usually employed in the Black Sea grain trade, and it was necessary under the circumstances of that trade that she should be provided with separation cloths and dunnage mats for the proper carriage of her cargo:—

Held (affirming the judgment of Bigham J.), that a time policy upon the ship and her furniture covered a loss of such cloths and mats, although at the time when the loss occurred the vessel was not engaged in the before-mentioned trade, and the cloths and mats were not in use but stowed away in the forepeak.

APPEAL from the judgment of Bigham J. (1) at the trial before him without a jury.

The action was by shipowners against underwriters upon a policy of marine insurance on ship. The policy, which was in the form of an ordinary Lloyd's policy, was a time policy, by which "the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship *Felbridge*" were insured for "the space of twelve calendar months commencing from noon, June 1, 1897, and ending at noon, June 1, 1898 (beginning and ending with Greenwich mean time), as employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, and in all places, and on all occasions, services and trades whatever and wheresoever, under steam or sail."

It appeared that the ship was generally employed in the grain trade, carrying grain principally from the Black Sea and sometimes from America. Evidence was given to the following effect. It is the practice for ships engaged in the Black Sea grain trade to carry separation cloths for the purpose of dividing the different parcels of grain shipped, and dunnage mats, which are mainly used for the purpose of keeping the

(1) [1899] 2 Q. B. 401.

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grain off the floor of the ship and so preventing it from getting into the pumps and from being damaged by wet from the floor. In the Black Sea grain trade the use of separation cloths is absolutely necessary, because in that trade the grain is shipped in many different parcels. On the other hand, in the case of cargoes of grain from America there is no occasion for separation cloths, as the grain is always shipped in one parcel; and it is not the practice in that trade to use dunnage mats, wooden battens being used for dunnage purposes instead. The *Felbridge* was provided with separation cloths and dunnage mats in accordance with the above-mentioned practice of the Black Sea grain trade. During the currency of the policy the *Felbridge*, being homeward bound from an American port with a cargo of grain, and having her separation cloths and dunnage mats stowed away in the forepeak, came into collision with a pier-head stem on, with the result that the stem was considerably damaged, and a large quantity of the cloths and mats were washed out of the forepeak and lost. The shipowners sued to recover the amount of the loss so sustained by them. The underwriters defended the action on the ground that the separation cloths and dunnage mats were not covered by the policy. The learned judge held that they were part of the ship's furniture and therefore covered by the policy: and accordingly he gave judgment for the plaintiffs.

J. A. Hamilton (*Joseph Walton, Q.C.*, with him), for the defendants. The separation cloths and dunnage mats formed no part of the furniture of the ship within the meaning of the policy. They were matters which were provided by the shipowners for the purposes of their business as carriers by sea as distinguished from the purposes of their business as shipowners and had relation rather to the cargo than to the ship. They facilitate the right delivery of cargo to the various consignees, but they have no relation to the seaworthiness of the ship or her capacity to carry the cargo in safety. There was no evidence to justify the learned judge in finding that the ship would have been unseaworthy for the carriage of grain from the Black Sea without these cloths and mats, and he was

wrong in so finding. [He cited *Hoskins* v. *Pickersgill* (1); *Hill* v. *Patten* (2); *Brough* v. *Whitmore* (3); *Robertson* v. *Ewer* (4); *Gale* v. *Laurie*. (5)]

Rufus D. Isaacs, *Q.C.*, and *Montague Lush*, for the plaintiffs, were not called upon.

A. L. SMITH L.J. I think that the judgment of Bigham J. was right. The question in this case turns upon the construction of a time policy upon a ship. The policy covers the widest possible trading by the ship, since she is, during its currency, thereby insured "at all times, in all places, and on all occasions, services, and trades whatever and wheresoever." The insurance is expressed to be upon "the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of and in the good ship *Felbridge*." Evidence was given to the effect that in the Black Sea grain trade, in which this ship was usually engaged, separation cloths and dunnage mats were always required. The question is whether, that being so, they do not form part of the furniture of the ship within the meaning of the policy. I think there can be only one answer to this question—namely, that they do. The defendants' counsel objected to the judgment of Bigham J. because he said that without these separation cloths and dunnage mats the vessel would not be seaworthy. As regards the dunnage mats, if they are, as was stated, laid on the floor of the ship to prevent the grain from being damaged by wet from the floor, I should think that the vessel would not be seaworthy for the carriage of grain in bulk unless she had such mats; and, as regards the separation cloths, I do not think the question whether the ship would be seaworthy without them is really material to the judgment. My brother Bigham upon the evidence came—and, in my opinion, rightly came—to the conclusion that both the separation cloths and the dunnage mats were part of the furniture of the ship. He said: "I can see no distinction

(1) (1783) 3 Doug. 222.
(2) (1807) 8 East, 373; 9 R. R. 469.
(3) (1791) 4 T. R. 206; 2 R. R. 361.
(4) (1786) 1 T. R. 127; 1 R. R. 164.
(5) (1826) 5 B. & C. 156; 7 D. & R. 711; 29 R. R. 199.

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between them and movable bulkheads, which it was admitted by the defendants would form part of the ship's furniture." If it is admitted that such bulkheads would be ship's furniture, why are not separation cloths and dunnage mats used for the like purposes also ship's furniture? As I have already said, in my opinion they clearly are. I think the appeal should be dismissed.

VAUGHAN WILLIAMS L.J. concurred.

ROMER L.J. I agree. I think that a time policy such as we have to construe covers fittings, or things in the nature of fittings, though not affixed to the ship, provided by the shipowner for the purposes of the ship, and reasonably necessary in order to enable the ship to carry any kind of cargo ordinarily carried by her, even although they were not in use at the time when the loss occurred.

Appeal dismissed.

Solicitors for plaintiffs: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1900
May 29.

ANDERSON *v.* VICARY.

Game—Ground Game—"Occupier of Land"—Owner occupying his own Land—Ground Game Act, 1880 (43 & 44 *Vict. c.* 47).

An owner occupying his own land is an "occupier of land" within the meaning of the Ground Game Act, 1880, s. 1.

The owner of land granted to the plaintiff a lease of the exclusive right of sporting upon the land, and subsequently, during the currency of the lease, sold and conveyed the freehold to the defendant, who entered into occupation of the land. The defendant caused the rabbits on the land to be trapped, claiming as occupier a right to do so under the provisions of the Ground Game Act, 1880, whereupon the plaintiff brought an action against him for infringement of the plaintiff's exclusive right of sporting:—

Held (by Vaughan Williams L.J. and Romer L.J., A. L. Smith L.J. dissenting), that the defendant, being the occupier, was entitled under the Ground Game Act, 1880, to kill the ground game, none the less because he happened to be also the owner.

APPEAL from a judgment of Wright J. in an action tried before him without a jury. (1)

The action was for damages for infringement of the plaintiff's exclusive right of sporting over a farm, called Northcombe, in the parish of Bovey Tracey, in the county of Devon, and being a portion of the Plumley estate, and for an injunction to restrain such infringement in future.

By an agricultural lease dated January 18, 1893, John Harris leased the before-mentioned farm to William Wrayford for the term of twenty-one years, reserving the game and rabbits (subject as to the latter to the Ground Game Act, 1880) and the sole right of hunting, coursing, and shooting over the farm. By a deed dated August 31, 1895, John Harris granted to the plaintiff a lease for five years from January 1, 1896, of Plumley House, together with the exclusive right of shooting, sporting, and preserving game upon the whole of the Plumley estate, reserving to his remaining tenants, in common with the lessee, and subject to the Ground Game Act, the right of hunting for

(1) [1899] 2 Q. B. 436.

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and killing rabbits. By a deed dated January 13, 1898, John Harris conveyed to the defendant as purchaser the freehold of the farm then under lease to Wrayford. The defendant subsequently procured Wrayford to surrender his lease of the farm, and the defendant entered into occupation of it in September, 1898, and farmed the land himself. Finding that the rabbits were doing damage to his crops, the defendant caused them to be trapped. The plaintiff thereupon brought the action. Wright J. held that the defendant had a right to trap the rabbits under the Ground Game Act, 1880, and accordingly gave judgment for the defendant.

Duke, Q.C., and *Bodilly*, for the plaintiff. The question in this case depends upon the true construction of the Ground Game Act, 1880, and the meaning of the expression "occupier of land" in that Act. The preamble and machinery of the Act indicate that it was intended for the protection of the tenant farmer class engaged in the business of husbandry against their landlords. The term "occupier" is used in it in contradistinction to "owner," and does not therefore include an occupying owner. The right conferred by the Act was not needed in order to protect owners. The limitations mentioned in s. 1 of the Act are inappropriate to an owner of land. It was held in *Smith* v. *Hunt* (1) that s. 6 of the Act did not apply to the owner of the soil, even though in occupation, on the ground that, although the language of s. 6 was wide enough to include such an owner, it must read as controlled by the general scope of the Act, which, as shewn by the earlier sections, was to protect tenant farmers only. Sect. 5 of the Act speaks of the "landlord, lessor, or occupier," thus shewing that the Legislature in using the term "occupier" in other sections were contemplating a tenant occupier.

[They also cited *Saunders* v. *Pitfield* (2); *Morgan* v. *Jackson*. (3)]

Foote, Q.C., and *Clavell Salter*, for the defendant. The term "occupier" would in its natural meaning include an occupying

(1) (1885) 54 L. T. 422. (2) (1888) 58 L. T. 108.
(3) [1895] 1 Q. B. 885.

owner, and there is no reason derivable from the context or the nature of things for restricting its meaning in the Ground Game Act, 1880, as suggested. The object of the Act, as shewn by its preamble, was to protect those engaged in the business of husbandry from injury to their crops by ground game; and the need for this protection may arise as well in the case of an occupying owner engaged in husbandry as in that of a tenant occupier. Where the sporting rights are not let off, the occupying owner no doubt does not need the protection of the Act, but, where they have been let, he needs it as much as would a tenant under similar circumstances. The actual decision in *Smith* v. *Hunt* (1), whether right or wrong, does not conflict with the judgment of Wright J. in the present case; for in that case the occupying owner does not appear to have let off the sporting rights, and it may be that the Act does not apply to such a case. The limitations mentioned in s. 1 of the Act would no doubt be inappropriate to the case of an occupying owner who retained the sporting rights, but they only apply to the right conferred by the section, and are not inappropriate in the case of an occupying owner where the sporting rights have been let. The Act has no operation where the occupying owner has not let off the sporting rights, but, where he has, he is as much within its scope as a tenant occupier would be.

Duke, Q.C., in reply.

A. L. SMITH L.J. I have the misfortune to be in a minority, but I am bound to express the opinion which I have formed with regard to this case. With all submission to my learned brothers, I think the case clear, when one studies the Act and remembers the circumstances with reference to which the Act was passed.

The action is brought by the plaintiff, who is the lessee of the shooting over certain land, against the owner of the land, who occupies it himself and has no agricultural tenant, for interfering with the plaintiff's right of sporting by trapping rabbits. The defendant justifies the acts complained of under

(1) 54 L. T. 422.

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the Ground Game Act, 1880, the shooting lease not having expired. The question raised by the case—and a very important question it is—is whether the Ground Game Act applies to landlords who own and occupy their own land and have no tenants whatever—in other words, whether the Act was passed in the interests of landlords to protect them against themselves, or in the interests of tenants to protect them against their landlords. My brother Wright J. has held that the Act applies to landlords who have no tenants. In this I do not agree. The facts are these. One Harris was, in 1895, the owner in fee of a farm, which he had in 1893 let to an agricultural tenant for a term of years, reserving the game and rabbits, subject as to the latter to the Ground Game Act. At that time, therefore, he had as owner, subject to the right of the agricultural tenant under the Act of killing ground game on the land, the undoubted right to let the shooting or retain it in his own hands as he thought fit. On August 31, 1895, he granted to the plaintiff a lease for five years from January 1, 1896, of the exclusive right of sporting over the farm, subject to the tenant's rights under the Ground Game Act. He subsequently sold and conveyed the freehold of the farm to the defendant, and the defendant, having procured a surrender by the agricultural tenant of his lease, entered into occupation of the farm and farmed the land himself; in fact, the defendant became the landlord occupying his own land, and, having no tenant, was dominus of the whole estate, subject to the unexpired shooting lease. It is contended that the defendant under these circumstances, being a landlord in occupation, is entitled to the right of killing and taking the ground game upon the farm under the Ground Game Act, 1880, and that the Act applies to him. That raises the question whether the term "occupier of land" as used in this Act includes a landlord who, having no tenant, occupies his own land. It is contended for the defendant that the Act was passed in the interests of landlords as well as in the interests of tenants. It seems to me quite contrary to what one knows of the circumstances with reference to which the Act was passed and to the Act itself to suppose that it was intended for the protection of

landlords who occupy their own lands. What need have such landlords of the protection given by the Act? They are free to let their shootings or not as they think fit. They are free to kill down their hares and rabbits as they think fit, and, if they let the shootings, they can make such terms with the lessees thereof as they deem necessary for their own protection. It is said that the Act was passed in the interests of good husbandry. Yes, so far as agricultural tenants are concerned, not as regards landlords: its object was to protect tenants from their landlords, and to prevent the crops of tenant farmers from being eaten up through the over-preservation of the ground game by landlords, which occurred before the Act was passed in many parts of the country. Now, the Act is described as "an Act for the better protection of 'occupiers of land' against injury to their crops from ground game," and it recites that it is expedient that "further provision should be made to enable such 'occupiers' to protect their crops from injury and loss by ground game." It seems to me clear that what the Legislature had in view was the protection of tenants, and that the word "occupier" here and throughout the Act means tenant as distinguished from landlord. A landlord who occupies his own land does not need protection. As I have said, he is master of the situation and can protect himself. For the purpose of affording the requisite protection, s. 1 provides that "every occupier of land"—by which in my view is clearly meant an occupier of land as tenant as distinguished from a landlord—shall have as incident to his "occupation" of the land the right to kill and take ground game thereon concurrently with any other person who may be entitled to kill and take ground game on the same land. What does an owner of the freehold in the soil, the landlord, who is himself in occupation, want with such a right as this? He has the right of killing ground game by virtue of his ownership, unless he or his predecessor in title has chosen to let it upon terms agreeable to himself and thus protect himself. Then follow a series of limitations with regard to the right of the "occupier" to kill the ground game, which do not seem to me appropriate to the case of the owner of the freehold himself who has no tenant.

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Sub-s. 1 is worthy of consideration: "the 'occupier' shall kill and take ground game only by himself or by persons duly authorized by him in writing." Does "occupier" mean a landlord who occupies his own land himself without a tenant? If so, an owner of an estate who farms it all himself cannot have a shooting party without authorizing his friends in writing to shoot hares or rabbits, which, with all submission to those who think otherwise, is absurd. If the word "occupier" means tenant here, as I am clear it does, it means the same throughout the Act. By sub-s. 3 it is provided that in the case of moorlands and uninclosed lands (not being arable lands) the occupier and the persons authorized by him shall exercise the rights conferred by the section only from December 11 in one year until March 31 in the next year. That was meant to provide for the case of moors coming down to arable farms, and was intended to prevent the tenants who had grazing rights over portions of moor from coming on to the moors to kill off the ground game at a period of the year when it would interfere with the grouse shootings. It seems to me out of all reason to suppose that this provision was intended to apply to an occupying landlord who, except in close time, is entitled to shoot all over his land at any time of the year he pleases. Sect. 2 of the Act appears to me to contemplate the case of a tenant who has, apart from the Act, the right of sporting, and grants away to some other person the right of killing the ground game. It provides that he shall nevertheless have as incidental to and inseparable from his occupation the right mentioned by s. 1 of the Act. Sect. 3 provides that agreements in contravention of the right of the occupier under the Act to kill ground game shall be void, and has no application in my view to the present case. At the end of s. 5 it is provided that "nothing in this Act shall affect any special right of killing or taking ground game to which any person other than the landlord, lessor, or occupier may have become entitled before the passing of this Act by virtue of any franchise, charter, or Act of Parliament." We find therefore in this section that the words "landlord" and "lessor" are used in contradistinction to the word "occupier," which tends to shew

that the Legislature did not contemplate an occupying owner when they used the word "occupier," but were contemplating an occupier as distinguished from an owner. It is contended that, when an occupying owner has leased the right of sporting, he becomes "an occupier" within the meaning of the Act, even if he was not so before. Why so? He had it all in his own hands, and needed no protection of the Act. For the reasons I have given, I cannot agree with the contention that the Act applies to the case of a landlord who has no agricultural tenant. I think that the Ground Game Act was passed in the interest of tenants alone, and only comes into play in cases in which there is a landlord and an agricultural tenant whose interests with regard to the game are antagonistic, and where the crops of the tenant may be eaten up through the over-preservation of game by the landlord. That was the view taken by Mathew J. and myself in *Smith* v. *Hunt*. (1) That was, no doubt, a decision on the meaning of the words "person having a right of killing ground game under this Act or otherwise" in s. 6 of the Act, but we decided the case on the view that the Act as a whole only contemplated the protection of a tenant from ground game of his landlord. For these reasons I think that the appeal should be allowed, but my learned brothers are of the contrary opinion, and it will be dismissed.

VAUGHAN WILLIAMS L.J. I cannot say that I have no doubt in this case, my Lord having expressed such a strong opinion on the matter, but I have come to a different conclusion from that at which he has arrived. I think that the judgment of Wright J. was correct. The question really turns upon the meaning of the term "occupier of land" as used in the Ground Game Act, 1880. I do not see any reason for limiting the meaning of that term, or for giving it any other than its natural signification. It is true, when one looks at the Act, that it only takes effect where there are what I will call for the moment antagonistic rights, but that does not in my opinion in any way necessitate the limitation of the meaning

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of the words "occupier of land" as used in it, so as to exclude an owner who occupies his own land. I am far from saying that the Act was passed for the protection of landlords, and I do not know that it was passed for the protection of tenants only. It seems to me, judging from the preamble, that it was passed for the purpose of preventing the separation of the right of sporting from the occupation of agricultural land from prejudicing the cultivation of the land, and causing a waste of the capital and labour invested therein. For that purpose s. 1 provides that the occupier shall always have the statutory right of killing and taking ground game given to him by the section, and that that right shall be inseparable from the occupation of the land. That right is to be subject to certain limitations and conditions mentioned in the section. I quite agree that those limitations and conditions are inapplicable to a case where an owner occupies his own land and retains the sporting rights. For that reason I think that the case of *Smith* v. *Hunt* (1) was rightly decided. That was a case in which the occupying owner appears to have retained his right of sporting. There was no occasion in such a case that any legislation should come into force to prevent prejudice to the occupier of agricultural land by reason of the separation of the right of sporting from the occupation of the land, and the limitations and conditions mentioned in the Act are only intended to apply where there is such a separation. In the present case the owner is in occupation of his own land, but the right of sporting has been parted with by his predecessor in title, and I cannot therefore see any reason why these limitations and conditions should be inapplicable. It appears to me that in such a case the occupying owner has a right to kill and take the ground game under the Act, and therefore it is proper that he should be subject to the statutory limitations and conditions. I think that this view is strengthened when one comes to look at s. 2 of the Act, the words of which, construed in accordance with their natural meaning, are wide enough to include an occupier of land who is himself the owner, as well as an occupier who is a tenant. The words of that section appear to me strong to

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shew that the Legislature did not care who the person was who was separating the right of killing ground game from the occupation of the soil by the cultivator, and intended to provide that, whenever that separation existed, the occupier of the soil purporting to grant away the right of killing such game, whoever he might be, should nevertheless retain and have as incident to and inseparable from his occupation the statutory right given by s. 1 of the Act. Any agreement to the contrary is in violation of the spirit and intention of the Act, and is by s. 3 made void. For these reasons I think that the defendant is entitled to succeed. I only wish to say again in conclusion that there seems to me to be nothing in the judgment we are giving which involves the proposition that the Act has any application to the case of an occupying owner where the sporting rights have not been separated from the occupation of the land.

ROMER L.J. I also have come to the conclusion that the judgment of Wright J. should be affirmed. In my opinion it was the policy of the Ground Game Act, 1880, to ensure that all occupiers of land should have the right to kill and take the ground game, and therefore it conferred an inalienable right to do so on all occupiers who otherwise would not have such a right. The Act no doubt is only dealing with occupiers who, apart from the Act, would have no right to kill the ground game; but I think it contemplates all occupiers, of whatever kind, who, by reason of the existence of rights in other persons, in the absence of its provisions would not have that right. I cannot find on the face of the Act any distinction drawn between different kinds of occupiers, and I cannot see any reason why such a distinction should be drawn. My Lord has said that it was not the policy of the Act to benefit landlords. I think that may be conceded. Its object was, I think, as the Act itself states, to protect occupiers of land from injury to their crops by ground game. Such protection appears to me to be equally necessary in every case where an occupier is prevented, by reason of the right of sporting not being in his own hands, from keeping down the ground game. The Act was

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passed to protect all such occupiers, so far as I can see, and I find nothing in its terms to shew that the Legislature intended to exclude some occupiers from its operation because they belonged to the landlord class. Occupiers of whatever tenure, if unable, apart from the Act, by reason of outstanding rights, to keep down the ground game, need the protection given by the Act, and appear to me to come within its purview. The contention for the plaintiff is that an occupier, in order to come within the Act, must only have a chattel interest. I cannot see why that should be so. It is admitted that there is no limitation with regard to the amount of such chattel interest, and that an occupier who had a term of a thousand years would be within the Act; but it is said that a tenant for life or an owner in fee, who occupied, would not, although the policy of the Act would appear to apply to one as much as the other. I can see no reason in the nature of things why such a distinction should be drawn, and it is in my opinion wholly unsupported by anything to be found in the language of the Act. I think that to narrow the meaning of the Act as suggested would be unjustifiably to cut down its operation, and to work injustice in many cases. Let me give an instance to shew how it would work. Suppose a landlord, having let to an agricultural tenant since the passing of the Act, grants a lease of the shooting. The lessee of the shooting cannot prevent the agricultural tenant from keeping down the ground game. But suppose the agricultural tenant fails and absconds, and the landlord for the protection of the derelict land is obliged to enter and farm the land himself. According to the contention of the plaintiff the effect is that the landlord will not be in the same position as his agricultural tenant was with regard to the right to keep down the ground game, but must work the farm subject to the right of the shooting tenant to allow the ground game to multiply without limit. Why should the shooting tenant's rights be thus unnecessarily enlarged? I can see no reason why. I will give another instance. Take the case of a farmer who has a lease from his father of a small tenement, of which the father is owner, and who carries on his business as a farmer upon it. Suppose that he lets off the shooting rights, the result

being that he nevertheless retains the right of killing ground game under the Act; and the father then dies and he succeeds to the land as his heir. The effect of the plaintiff's contention would be that he must then carry on his business as farmer without the right of keeping down the ground game, and that the shooting tenant would really acquire a right which he never had before. I cannot see why a distinction which produces such a result and is not to be found in the words of the Act itself should be imported into it. It seems to me that, when one examines the Act in detail, not only is there nothing which justifies such a limitation of its provisions, but there is everything to support the opposite construction. The title of the Act describes it as "An Act for the better protection of occupiers of land against injury to their crops from ground game." The persons to be protected appear to be all occupiers whose crops may be injured by ground game. Then it is recited that "it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game." It is accordingly provided by s. 1 that "every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land." There appears to me to be absolutely nothing in the Act to support the suggestion that it is only intended to deal with the tenant class. On the contrary its terms seem to me to shew that it was intended to apply to all occupiers who have not otherwise the right to kill the ground game, and there is no distinction drawn between different classes of occupiers. Sect. 2, as has been already pointed out, strongly supports this view. With regard to s. 6, and the construction put upon it by the decision in *Smith* v. *Hunt* (1), that case, as my brother Vaughan Williams L.J. has explained, stands on a perfectly distinct footing. It may well be supported on the ground pointed out by him, but, whether

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it was rightly decided or not, it does not in any way conflict with the view I am now expressing. For the reasons which I have given I think that the operation of the Act ought not to be cut down as suggested, and that it ought not to be construed so as to exclude from the benefit of it any occupier, whatever his status, who would not, apart from its provisions, have the right to kill the ground game.

Appeal dismissed.

Solicitors for plaintiff: *Mann & Crimp, for Hacker & Michelmore, Newton Abbot.*

Solicitors for defendant: *Church, Rendell, Todd & Co., for Baker, Watts, Alsop & Woollcombe, Newton Abbot.*

E. L.

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May 2, 7.

NICKOLL & KNIGHT *v.* ASHTON, EDRIDGE & CO.

Contract—Impossibility of Performance—Implied Condition—Measure of Damages.

By a contract made in October, 1899, the defendants sold to the plaintiffs a cargo of cotton-seed, to be shipped at certain Egyptian ports during the month of January, 1900, per steamship *Orlando*, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that, "In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be cancelled." In December, 1899, the *Orlando* was, without default on the part of the defendants, stranded, and was so much damaged as to render it impossible for her to arrive at the ports of loading before the end of January; and on December 20 notice of that fact was given to the plaintiffs. Upon receipt of that notice the plaintiffs might have bought in the market another cargo of cotton-seed in substitution for that sold to them by the defendants, but they declined to do so. The market was rising, and by the end of January the market price had risen considerably above the point at which it stood at the time when the plaintiffs had notice of the stranding. The plaintiffs sued the defendants for breach of their contract, claiming as damages the difference between the contract price and the market price at the end of January:—

Held, that the contract must be read as subject to an implied condition that, in the event of the ship not arriving at the ports of loading within the stipulated time in a fit state to receive the cargo, the contract should be treated as at an end; that the implication of that condition was not

excluded by the clause expressly providing for the cancellation of the contract in the specified events; and that the defendants were not liable.

Semble, that if the plaintiffs had been entitled to recover, inasmuch as they were under the circumstances bound to endeavour to mitigate the loss, the measure of their damages would have been the difference between the contract price and the market price at the date when they had notice of the stranding, and no more.

TRIAL before Mathew J. without a jury in the Commercial Court.

By a contract dated October 24, 1899, the defendants sold to the plaintiffs a cargo of Egyptian cotton-seed to consist of 1600 to 1900 tons, to be shipped at Alexandria $\frac{\text{and}}{\text{or}}$ Port Said $\frac{\text{and}}{\text{or}}$ Ismailia during the month of January, 1900, per SS. *Orlando*, at 6*l.* 3*s.* 9*d.* per ton, and to be delivered in the United Kingdom. The contract provided by clause 5 that, "In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be cancelled." The *Orlando* had been chartered for the carriage of the cargo in question, not by the defendants, but by third persons from whom they themselves had bought the cargo. In December the *Orlando* stranded in the Sound by perils of the sea, and was so badly injured as to make it impossible for her to arrive at the ports of loading under the contract in time to load during the month of January; and of that fact notice was given by the charterers to the plaintiffs on December 20. At that date the price of cotton-seed had risen slightly above the contract price, and it continued to rise until the end of January, at which latter date the market price was 7*l.* 13*s.* 9*d.* per ton. The plaintiffs might at the end of December, when they had notice of the *Orlando's* stranding, have bought in the market another cargo of cotton-seed in substitution for that which had been sold to them by the defendants; but they did not do so. On December 28 the defendants wrote to the plaintiffs to the effect that, as the performance of the contract was rendered impossible, they considered the transaction as cancelled.

The plaintiffs brought this action against the defendants for breach of their contract to ship the said cargo, claiming

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as damages the difference between the contract price of 6*l.* 3*s.* 9*d.* per ton and 7*l.* 13*s.* 9*d.*, the market price on January 31.

Joseph Walton, Q.C., and *Hollams*, for the plaintiffs. The contract of the defendants to ship the cargo in January on board the ship named was absolute, subject only to the particular exceptions specified in clause 5. No other exception can be implied. As to the measure of damages, the plaintiffs are entitled to the difference between the contract price and the market price on January 31, which was the latest date allowed by the contract for performance. Damages for breach of contract are always to be measured as of the date of the breach. But the plaintiffs were not bound to treat the defendants' letter of December 28 as a breach of the contract at that date; it was at their election whether they would do so or not, and they did not so elect. They were entitled to wait until the time for performance under the contract had expired. In a case in which a party to a contract announces his intention not to perform it, the law is clearly laid down by Cockburn C.J. in *Frost* v. *Knight* (1): "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of performance. . . . On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject however to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." And there is no distinction in this respect to be drawn between a repudiation of a contract and an announcement of impossibility of performance. No doubt if the plaintiffs had chosen to treat the contract as broken on December 28, they would have been bound to take steps to mitigate the loss by buying

(1) (1872) L. R. 7 Ex. 111, at p. 112.

against the defendants in the market at that date: *Roth & Co.* v. *Taysen.* (1)

Bray, Q.C., and *E. Bray*, for the defendants. First, as to the question of liability. There was under the circumstances no breach by the defendants of their contract. The performance was contemplated by the parties as being dependent on the continued existence of the ship in a fit condition to receive the cargo, and a stipulation to that effect must be implied: *Taylor* v. *Caldwell* (2); *Robinson* v. *Davison.* (3) The case is on all fours with *Howell* v. *Coupland* (4), where the defendant contracted in March to sell to the plaintiff 200 tons of potatoes grown on certain specific land to be delivered in the autumn, and, the crop having failed so that performance of the contract was rendered impossible, the defendant was held to be excused. The contract here did not contain any warranty that the ship should arrive in time to be loaded. The inclusion of certain special exceptions in clause 5 does not exclude the implication of a further exception of non-arrival of the ship in time to load. In *Johnson* v. *Macdonald* (5), where a contract for the sale of a quantity of nitrate of soda "to arrive ex *Daniel Grant*" contained the clause "should the vessel be lost this contract to be void," it was held that the contract did not amount to a warranty on the part of the seller that the nitrate of soda should arrive if the vessel arrived, but to a contract for the sale of goods at a future period, subject to the double condition, of the arrival of the vessel, with the specified cargo on board.

Secondly, as to the measure of damages. There is a distinction between the case of a defendant repudiating his contract, and one in which it has become altogether impossible for him to perform it. In the case of repudiation it is reasonable for the plaintiff not to elect at once to treat the contract as at an end, but to wait and give the defendant a locus pœnitentiæ; for it may be that the defendant before the time originally fixed for the performance of the contract has expired may change

(1) (1896) 1 Com. Cas. 306.
(2) (1863) 3 B. & S. 826.
(3) (1871) L. R. 6 Ex. 269.
(4) (1876) 1 Q. B. D. 258.
(5) (1842) 9 M. & W. 600.

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his mind and perform it after all. But where the performance has become impossible it is otherwise; and there the plaintiff, as soon as he has notice of the impossibility, ought to go into the market and buy against the defendant in order to minimise the loss by fixing it at once. And especially ought he to do that where, as here, the market is rising.

Walton, Q.C., in reply. If the defendants are right as to the implication of a condition that the ship should arrive in January, then it follows that they would be protected whatever the cause of the ship's non-arrival might be. But surely it could never be contended that the vendors would be excused if the cause of the ship's absence were the refusal of the shipowner, who was a stranger to the contract, to send his ship to the port of loading.

Cur. adv. vult.

May 7. MATHEW J. This is an action brought to recover damages for breach of a contract dated October 24, 1899, whereby the defendants sold to the plaintiffs a cargo of Egyptian cotton-seed to be shipped at Alexandria $\frac{\text{and}}{\text{or}}$ Port Said $\frac{\text{and}}{\text{or}}$ Ismailia during the month of January, 1900, by the steamship *Orlando* at 6*l.* 3*s.* 9*d.* per ton. After the contract had been so made the *Orlando*, which was then in the Baltic, was stranded by perils of the sea, and was so damaged as to render it impossible for her to arrive at the port of loading within the time stipulated; and notice of that fact was on December 20 given to the plaintiffs. Thereupon there was a proposal made to settle any dispute between the parties by arbitration; but the attempt to arbitrate became abortive, and the case came into court and was tried before me.

It was contended on behalf of the plaintiffs that the contract to ship the cargo in January was absolute, and that a warranty should therefore be implied that the ship would then be fit to take the cargo on board. It was said that the defendants, not having provided by the terms of their contract against such a contingency, took upon themselves the risk of the ship being lost or disabled by perils of the sea. The principle upon which the plaintiffs rested their contention is indicated in a number

of cases of which the recent case of *Ashmore & Son* v. *Cox & Co.* (1) is an instance.

On the other hand, it was contended for the defendants that it was unreasonable to imply such a warranty, for no man of business would be likely in such a contract to insure the safety of the ship from the date of the contract till the following January. Both parties, it was said, assumed that the ship would be fit to fulfil her engagement, and therefore had contemplated her continued existence and fitness to take the cargo on board as the basis of what was to be done. It was argued that a condition ought to be implied that the defendants should be excused from performance of the contract when performance became impossible by the loss or damage of the ship by sea peril. Many cases were cited in support of this contention, but reliance was principally placed upon the statement of the law by Blackburn J. in *Taylor* v. *Caldwell* (2), which is in these terms: "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible. . . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." In the course of argument cases were

(1) [1899] 1 Q. B. 436. (2) 3 B. & S. at p. 833.

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NICKOLL & KNIGHT v. ASHTON, EDRIDGE & Co.

Mathew J.

referred to as shewing that that principle is well established in the law, and it may be pointed out that it is recognised in the Sale of Goods Act, 1893, s. 7 of which provides that "Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided." It seems to me that the defendants' contention is right, and that under the circumstances the contract was at an end. It had become impossible of performance, and the condition ought to be implied that neither party was to be bound.

It was further contended for the plaintiffs that, although such an implication might arise under other circumstances, it was not reasonable having regard to the provisions of clause 5 of the contract, which was in the following terms: "In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be cancelled." It was said that that clause contained the sole conditions on which the contract was not to be binding, and that no additional condition ought to be implied, upon the principle that expressum facit cessare tacitum. The conditions, however, are not repugnant. They are all useful and reasonable. And the implied condition contended for by the defendants applies to a different stage of the transaction from that contemplated by clause 5. I therefore think that that contention of the plaintiffs fails.

But then it was asked, How far is the implication of this condition to go? Is it to be implied in all cases, as, for example, where the shipowner sends the vessel to another port, or absolutely refuses to take the cargo on board? The answer is that in such a case the implication would not be reasonable, for the plaintiffs would naturally assume that the defendants were protected by a contract of charterparty which would bind the shipowner to take the cargo on board, and that there would consequently be a remedy over against him if he refused to do so.

There is one other matter which was much discussed in argument, and to which, although it is unnecessary for the

purposes of my judgment, I should like to refer, and that is the question as to what would have been the proper measure of damages if the plaintiffs had been entitled to recover. It appeared that towards the end of December the plaintiffs might have obtained another cargo at the then market price, which was much lower than the price at the end of January. But it was insisted for the plaintiffs that they were entitled to wait and watch the rising market until the end of January, and then claim their damages on the footing of the then market price. In my opinion that contention was wholly untenable. Having regard to the decision in *Roth & Co.* v. *Taysen* (1), I think the plaintiffs were bound to endeavour to mitigate the loss by acting as ordinary men of business would have acted, that is to say, by determining the liability at the earliest date at which they were able to obtain another cargo. There must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Hollams & Co.*
Solicitors for defendants: *Tilleards & Co.*

(1) 1 Com. Cas. 306.

J. F. C.

1900
May 17.

In re GREENWOOD & CO.

Company—Winding-up—Creditor's Petition—Right of Creditor to Winding-up Order.

An unpaid creditor of a company is not entitled to a winding-up order unless he can shew that the general body of the creditors will derive benefit from the order being made; it is not enough for him to shew that he himself will be benefited by it.

A company, which had not sufficient assets to satisfy the claims of its debenture-holders, took legal proceedings for the recovery of a debt and failed, and was ordered to pay costs to the successful party. The debt in question purported to form part of the security for the payment of the debentures, and had it been recovered the debenture-holders alone would have been benefited thereby. The successful party, failing to get payment of his costs from the company, applied to the Court for a winding-up order with a view to compelling the company to enforce its right of indemnity for the costs against the debenture-holders for whose benefit the legal proceedings had been taken:—

Held, that, as the enforcement of the right of indemnity would confer no benefit upon the general body of the creditors, the winding-up order ought not to be granted.

APPEAL from county court of Birmingham.

A limited company, Thomas Greenwood & Co., had issued debentures by way of floating charge upon the assets of its business. Amongst the assets charged by the debentures was a debt owing by certain third persons to the company. Before any proceedings had been taken by the debenture-holders to enforce their security, the company in the ordinary course of its business assigned the debt to a Mr. Butler. The debenture-holders then commenced proceedings to enforce payment of their debentures, and a receiver was appointed. The company, which was insolvent, passed resolutions for its voluntary winding-up, and the receiver for the debenture-holders was appointed liquidator. Subsequently the company brought an action for the recovery of the above-mentioned debt, alleging that it had never been effectually assigned by the company and still belonged to the company. The debtor interpleaded, and an interpleader issue was tried with the result that Butler was

held entitled to the debt, and the company was ordered to pay Butler's costs. The interpleader proceedings were fought by the company in the interest of the debenture-holders only, and no part of the debt, if it had been recovered, would have gone to the general body of the creditors. The company having no assets wherewith to pay Butler's costs, he applied to the county court judge for an order for the compulsory winding-up of the company, or in the alternative for the continuance of the voluntary winding-up under the supervision of the Court, with a view to making a further application to the Court to compel the company to enforce its right of indemnity for the costs against the debenture-holders. The county court judge refused the order upon the ground that the granting of it would benefit the petitioning creditor alone, and not the general body of the creditors. The petitioning creditor appealed.

C. A. Russell, Q.C., for the appellant. To entitle a creditor to a winding-up order, it is enough for him to shew that his position will be improved by the granting of it. The county court judge relied upon *In re Chapel House Colliery Co.* (1) But that case does not support his view. All it decides is that the order will not be made when it is shewn that the petitioning creditor cannot gain anything by a winding-up order. It is not necessary that the asset which is to be reached by means of the order should be divisible pro ratâ among all the creditors. A winding-up order is the only means by which the appellant can enforce his claim against the debenture-holders.

Ashton Cross, for the liquidator. The winding-up machinery provided by the Companies Acts was never intended to be used for the purpose of enabling a debt to be recovered for the benefit of a particular creditor. It is only to be put in motion for the benefit of the general body of creditors. The case of *In re Chapel House Colliery Co.* (1) was not meant to have the limited application contended for by the appellant.

Russell, Q.C., in reply.

(1) (1883) 24 Ch. D. 259.

1900

GREENWOOD & Co., *In re.*

RIDLEY J. I am of opinion that the county court judge had a discretion in the matter of this petition, and that he exercised that discretion rightly in refusing to make the order asked for. Here the petitioning creditor asked for the order for his own benefit only, and not for that of the creditors at large. I agree with the judge in thinking that he would not have been justified in employing the expensive machinery of statutory liquidation at the instance of a particular creditor to enable him to recover a sum of money which would not have been distributable among the creditors generally. *In re Chapel House Colliery Co.* (1) seems rather to support the judge's view than to be opposed to it.

BIGHAM J. I agree. It is provided by the Act that where a company is in voluntary liquidation a creditor may come to the Court and ask to have the voluntary liquidation turned into a compulsory liquidation, or else to have it continued under the supervision of the Court. But it is in the discretion of the Court whether it will grant the order, and, unless it would be in the interest of the general body of the creditors to grant it, the order ought not to be granted. Here the application was in the interest of one creditor only. I think the judge was right in exercising his discretion as he did.

Appeal dismissed.

Solicitors the appellant: *Cartwright & Cunningham, for Hargreave & Heaton, Birmingham.*

Solicitors for respondent: *Timbrell & Deighton, for Hooper, Tanfield & Fairbairn, Birmingham.*

(1) 24 Ch. D. 259.

J. F. C.

In re VAVASOUR.

1900
April 30.

Bankruptcy—Practice—Trustee—Committee of Inspection—Employment of Solicitor—Authority to do Particular Things—Costs—Taxation—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 57, *sub-s.* 3; *s.* 73, *sub-s.* 3—*Bankruptcy Rules*, 1886, *rr.* 117, 285—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 15, *sub-s.* 3.

The Bankruptcy Act, 1883, s. 57, empowers a trustee with the permission of the committee of inspection to (amongst other things) employ a solicitor to take any proceedings or do any business which may be sanctioned by the committee of inspection, and enacts: "The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases."

Sect. 73, sub-s. 3, provides that the taxing master, in taxing the bills and charges of solicitors, "shall satisfy himself before passing such bills and charges that the employment of such solicitors . . . . in respect of the particular matters out of which such charges arise, has been duly sanctioned"; and s. 15 of the Bankruptcy Act, 1890, enacts that "the sanction required under s. 73 of the principal Act for the employment of solicitors . . . . must be a sanction obtained before the employment."

The Bankruptcy Rules, 1886, provide (rule 285): "The official receiver until a trustee is appointed, and thereafter the trustee, shall keep a book, to be called 'The Record Book,' in which he shall record all minutes, all proceedings had, and resolutions passed at any meetings of creditors, or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the estate"; and (rule 117), "before taxing the bills or charges of any solicitor . . . . employed by an official receiver or trustee, the taxing officer shall require a certificate in writing, signed by the official receiver or trustee, as the case may be, to be produced to him, setting forth . . . . in the case of the bill of costs of a solicitor, a copy of the resolution or other authority sanctioning the employment."

In 1897 the tenant for life of large settled estates became bankrupt. The official receiver at first acted as trustee with a committee of inspection, and, with the sanction of the committee, employed A. & Co. as his solicitors in all matters relating to the letting and management of the estates. In 1898 M. was appointed the trustee in the bankruptcy with the same committee of inspection, and applied to them for permission to employ A. & Co. in the same capacity as before. Thereupon they passed the following resolution: "That Messrs. A. & Co. be employed by the trustee where necessary." Under this resolution M. employed A. & Co. in all matters connected with the letting and management of the estates.

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VAVASOUR, *In re.*

All the debts having been paid, A. & Co. carried in their bill of costs for taxation. The bankrupt objected to all items and charges relating to the letting and management of the estates on the ground that the written sanction of the committee for the disputed matters had not been obtained in accordance with the sections of the Acts and the Rules above stated. The committee deposed that they intended their resolution to apply to the disputed matters. The taxing master having overruled the objection, the plaintiff appealed :—

Held, (1.) that the resolution was in form insufficient; (2.) that the sanction of the committee need not be in writing, provided it was specific and given before the work was done; and (3.) that the bill of costs must be reviewed on this footing.

THIS was an application by the bankrupt to review the taxation of the bill of costs of the solicitors employed by the trustee in his bankruptcy under these circumstances.

On July 2, 1897, Sir W. Vavasour filed his own petition in bankruptcy, on which a receiving order was made and adjudication followed. The official receiver was in the first instance appointed the trustee in the bankruptcy with a committee of inspection. On May 4, 1898, a Mr. Miller was appointed the trustee with the same committee of inspection.

The bankrupt was tenant for life of large settled estates, consisting almost entirely of agricultural lands, with a rent-roll of about 9500*l.* a year. All the debts and costs had now been paid by the trustee out of moneys in his hands, but the bankruptcy had not yet been annulled.

The official receiver whilst acting as a trustee had, with the sanction of the committee of inspection, employed Messrs. Adams & Adams as his solicitors in various matters arising in the bankruptcy: in particular (1.) in an action of *Vavasour* v. *Vavasour* relating to the estate; (2.) in matters connected with the incumbrances on the estates; and (3.) in all other matters requiring legal assistance—in collecting the rents, the granting of tenancies, and other matters connected with the estates. Messrs. Adams and Adams' bills of costs as solicitors for the official receiver in the above matters had been taxed at 180*l.* 5*s.* 2*d.*, and paid.

Mr. Miller on his appointment as trustee was desirous of continuing the employment of Messrs. Adams & Adams as his solicitors in the same capacity as they had been employed by

the official receiver, and thereupon the committee of inspection on May 18, 1898, passed the following resolution: "That Messrs. Adams & Adams be employed by the trustee where necessary"; and at the same time they fixed the trustee's remuneration at 350*l.* per annum, with an allowance not exceeding 100*l.* per annum for out of pocket and travelling expenses. Under this resolution Mr. Miller employed Messrs. Adams & Adams as his solicitors in various matters arising in the bankruptcy, including all matters relating to the letting and management of the settled estates. On Messrs. Adams & Adams carrying in their bills of costs as solicitors for Mr. Miller for taxation, the bankrupt objected to all the items and charges relating to the letting and management of the estates on the ground that the trustee had not obtained specific permission notified in the minutes of the committee of inspection to employ legal aid in the matters in question, as required by s. 57 of the Bankruptcy Act, 1883, and s. 15 of the Bankruptcy Act, 1890.

The committee of inspection filed a joint affidavit in support of Messrs. Adams & Adams, in which they deposed that on May 18, 1898, they authorized Mr. Miller to employ Messrs. Adams & Adams as his solicitors, "and it was our intention that the said firm should be employed upon the same terms as they had previously been employed by the official receiver (except that we did not put any limit upon the amount of their costs), namely, (1.) to act for him in connection with the action of *Vavasour* v. *Vavasour*; (2.) in connection with the mortgages on the estates; and (3.) in connection with all matters relative to the estates, and the tenancies and other matters connected therewith." The taxing master overruled the objection, and allowed the bill at 213*l.* His minute in answer to the objection was as follows: "The question as to the sufficiency of the sanction given by the committee of inspection to employ a solicitor to do the work mentioned in this objection has been thoroughly discussed and argued on the taxation, and having regard to the resolution of the committee both during the trusteeship of the official receiver and that of Mr. Miller, and to the affidavits sworn (for the purpose of this taxation)

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VAVASOUR, *In re.*

by the members of the committee, and by the present trustee and Messrs. Adams (his solicitors), I remain of the opinion that the permission to do the work objected to was sufficient under all the circumstances of the case. Objection therefore disallowed."

The bankrupt appealed.

Ringwood, for the bankrupt. The resolution of May 18 is insufficient, and did not authorize the employment of Messrs. Adams in the cases objected to. Sects. 57 and 73 of the Act of 1883, as amended by s. 15 of the Act of 1890, require the trustee to obtain the sanction of the committee to the particular thing or things in respect of which he proposes to employ a solicitor, and the sanction must be given before the work is done. These sections tie down the trustee very tightly, and he must get the sanction of the committee for every step he takes in employing a solicitor. Then under rule 285 the sanction has to be recorded in the "record book" kept by the trustee, and by rule 117 a copy of the resolution or other authority sanctioning the employment of the solicitor has to be produced to the taxing officer before he proceeds with the taxation. Here the resolution is in general terms, and lets in all the evil the Legislature intended to prevent. It practically leaves it to the discretion of the trustee to decide when and to what extent he shall employ solicitors. In the case of *In re Duncan* (1) Vaughan Williams J. held (2) that the taxing officer has no jurisdiction to tax unless and until the resolution of the committee of inspection authorizing the employment of the solicitor is produced to him.

Reed, Q.C., and *Carrington*, for the trustee. This is in substance an appeal against the discretion exercised by the taxing master after a long and careful examination, and there is nothing to shew that his discretion was wrongly exercised. On the affidavit of the committee there was authority to employ the solicitors in the particular matters objected to. Sect. 57 must not be construed too narrowly. It does not mean that every step in each particular matter arising in the bankruptcy

(1) [1892] 1 Q. B. 879. (2) [1892] 1 Q. B. at p. 883.

must be specially sanctioned beforehand. That would make the Act and the Rules unworkable. It is sufficient if the committee know what is proposed, and approve the employment of the solicitor: *In re Johnstone* (1); and it is not necessary that every determination of the committee must be evidenced by a minute in the record book. It is to be inferred from s. 73 that permission may be given otherwise than by a special resolution in writing, because it says that the taxing master shall satisfy himself that the employment of the solicitors has been duly sanctioned. Here he has found that the authority was given. *In re Duncan* (2) does not apply.

Ringwood, in reply, cited *In re London Metallurgical Co.* (3)

WRIGHT J. This is a point of practice of some importance and of some difficulty. Under the Bankruptcy Act, 1890, s. 15, before these payments could be allowed it was necessary to prove an antecedent authority given to the trustee by the committee of inspection to employ a solicitor, and by rule 117, before the solicitor's charges can be allowed, there must be produced to the taxing master a copy of the resolution authorizing the employment of the solicitor. On the other hand, there is nothing in the Act or Rules as far as I can discover, or in any case, which requires the authority given by the committee of inspection to be in any particular form so long as it does not transgress the provisions of s. 57 of the Act of 1883, and particularly the last words of that section, to which I will refer again directly.

Here, the first question is—Is it proved in fact that the resolution passed by the committee of inspection was intended to cover all the work which the solicitor had done for the trustee? The very competent and experienced taxing master, after hearing the matter discussed in full, came to the conclusion that in point of fact the resolution was intended to cover all the work done by the trustee. He accepts the statement of the members of the committee of inspection, who were not cross-examined, and I see no reason whatever to quarrel

(1) (1885) 2 Morr. 206. (2) [1892] 1 Q. B. 879.
(3) [1897] 2 Ch. 262.

1900

VAVASOUR, *In re.*

Wright J.

with his findings on that question of fact. I should think the right conclusion is that the committee of inspection did intend that the trustee should continue to employ the solicitors to do all the same work which the solicitors had been doing for the official receiver, with the only one change of removing the limit of the amount of expenditure, which, in the case of the official receiver, had been imposed on the solicitors. I think, therefore, that there was the authority. Then there remains the question, Does the authority, in the form in which it was given, transgress the provisions of s. 57 of the Bankruptcy Act, 1883? That section says: "The trustee may with the permission of the committee of inspection do all or any of the following things"; and the third of the following things is: "employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection." The other sub-sections refer to carrying on business, instituting or defending actions, referring disputes to arbitration, and things of that kind. Then at the end come the words, "The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which the permission is sought in the specified case or cases." I find very great difficulty in dealing with these words. Some common sense must be introduced into them, and I should hesitate a long time before I held that it was necessary for a specific resolution to be passed for every step in an action. I do not think that can be the meaning. Still a line must be drawn somewhere. Here the permission given in point of form was that the solicitors "be employed by the trustee where necessary." I am anxious so far as I can to give effect to the views adopted in this case by the taxing master, but it seems to me that, if I were to hold that resolution to be sufficient to satisfy s. 57, I should be entirely nullifying the section. I think sub-s. 3 itself points to an authority to take particular proceedings or to conduct particular business in the bankruptcy. I quite agree that the resolution may be so worded as to cover any number of proceedings or any number of pieces of business, but then I

think it must specify the particular matters. The last words of the section are too strong in my judgment to be got over: "the permission shall not be a general permission to do all or any of the above-mentioned things." Now, the permission given here seems to me to be exactly a permission to do generally any work of a solicitor. I think the resolution must specify in some way or other the particular matter in which the solicitor may be employed, but here it does nothing of the sort. I do not think it is enough that the previous resolution (passed when the official receiver was acting) should, as it was construed in practice, have extended to all the work which the solicitors actually did. There is nothing in the previous resolution which specifies anything the trustee is to do in particular, and nothing which, if it could be imported into the resolution objected to, would cure the defect which seems to me to exist in this case. I am therefore driven to say that a resolution in this form is too vague, and that the matter must go back to the taxing master to reconsider it from that view. He will consider what is the effect of my holding that the resolution is insufficient. A written authority is not necessary. If he is of opinion that there was specific authority given to do each or any or all of the things which were done by the solicitors, that is enough in my judgment even though it is not in writing; but that this resolution does not shew. The motion must be allowed with costs. There will be liberty to apply.

Solicitors for bankrupt: *Robinson, Wilkins & Walton.*
Solicitors for trustee: *Adams & Adams.*

H. L. F.

C. A.
1900
May 25.

[IN THE COURT OF APPEAL.]

In re BEBRO.

Bankruptcy — Debtor and Creditor — Petition — Withdrawal — Dismissal by Consent—Increased Debt, Second Petition for—Receiving Order—Extortion —Pressure—Abuse of Process of Court—Procedure—Leave of Court to Withdrawal of Petition—Terms to be submitted to Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 7.

Where a creditor, having presented a bankruptcy petition against his debtor based upon a particular debt, such as a judgment debt, consents to its being dismissed upon the terms of the debtor agreeing to pay a fresh debt of increased amount, it is not an abuse of the process of the Court for the creditor, in case of the debtor making default, to present a second petition based upon the new debt, provided he has not used extortion or pressure towards the debtor.

Leave to withdraw a creditor's bankruptcy petition under s. 7, sub-s. 7, of the Bankruptcy Act, 1883, should not be given without the Court being first informed of the facts of the case and the proposed terms of withdrawal, so that it may exercise its judgment as to whether the case is a proper one for allowing a withdrawal.

On October 17, 1899, George Gibbons obtained judgment against Marcus Bebro for 115*l.* due on a bill of exchange, and on October 26 filed a bankruptcy petition against the debtor for 124*l.* 18*s.* 8*d.*, made up of the 115*l.*, 15*s.* 4*d.* interest, and 9*l.* 3*s.* 4*d.* costs of judgment.

On November 14, 1899, the petition came before the registrar, when, at the request of the debtor, it was at once dismissed "by consent" on the terms, which were not mentioned to the registrar, of Bebro giving Gibbons a new bill for 130*l.* at two months, paying the costs of the petition, which amounted to 22*l.* 10*s.*, and undertaking through his, Bebro's, solicitor, to pay the 9*l.* 3*s.* 4*d.*, costs of judgment, at an early date. These terms were proposed or suggested by Bebro himself, without, it appeared, any pressure from Gibbons, who, as the evidence shewed, had expressed his willingness to take the original amount of his debt, and without interest. Bebro accordingly gave Gibbons a bill for 130*l.* at two months, and also paid the

22*l.* 10*s.* costs of petition, but he did not pay the 9*l.* 3*s.* 4*d.* The bill was eventually dishonoured, whereupon Gibbons, on January 29, 1900, recovered judgment against Bebro for the amount and 4*l.* 14*s.* costs. On February 1, 1900, Gibbons filed a second bankruptcy petition against Bebro, founded on the non-payment of that judgment debt and of the 9*l.* 3*s.* 4*d.* On May 14, 1900, the petition came before the registrar, when it was contended on behalf of the debtor that, having regard to the excess of the amount of the debt on the second petition over the debt on the first, the creditor's demand was extortionate, and that the petition should therefore be dismissed. The registrar, however, held that the petitioning creditor had acted bonâ fide and without extortion, and he accordingly made a receiving order.

Bebro appealed.

The appeal was heard on May 25, 1900.

H. Reed, Q.C., and *Muir Mackenzie*, for the debtor, Bebro. This petition is an attempt at extortion. The debtor is in the power of the creditor, who says in effect, "I will make you a bankrupt unless you pay me a bonus on the debt." It is exactly like a case under the old compositions, when the creditor who stood out said to the debtor, "I will break up your composition unless you pay me more": a practice which was not allowed. This case is similar to that of *Re G.* (1), recently before this Court. It is now well settled that a receiving order will not be made on a bankruptcy petition which the Court sees has been used for extorting money from the debtor, for such an attempt on the part of the creditor by that means to put money into his own pocket is a fraud on the other creditors and also on the Bankruptcy Court: *In re Atkinson* (2); *In re Otway*. (3) After the petition has been presented it is not competent to the parties to make bargains behind the Court and without its knowledge.

[WEBSTER M.R. If the registrar finds there has been extortion, it does not matter how it was done: the transaction

(1) (1900) 44 Sol. J. 345. (2) (1892) 9 Morell, 193.
(3) [1895] 1 Q. B. 812.

C. A. 1900

BEBBO, *In re.*

cannot stand. Each case must depend upon the facts. Here the registrar has found that there was no extortion.]

Even apart from extortion, if the creditor gets from the debtor what he would not otherwise have got by proceeding with the petition, that is, something beyond the ordinary 4 per cent. interest, the bargain cannot stand. The creditor, by presenting the petition, says in effect that he desires that the Court should administer the assets of the debtor and make a receiving order, disobedience to which involves penal consequences: but he cannot use that proceeding for the purpose of getting a private benefit for himself. The registrar has applied the wrong principle here. Sect. 7, sub-s. 7, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), says that "a creditor's petition shall not, after presentment, be withdrawn without the leave of the Court." That is, if the creditor wants his petition dismissed, he must obtain an order of the Court for the purpose, which differs from the old practice, under which a petition could be withdrawn at any time without leave, on a mere notice to the registrar. Now, if the petitioning creditor does not proceed with due diligence, the Court may substitute another creditor, under s. 107.

Rufus Isaacs, Q.C., and *Harold Simmons*, for Gibbons, the petitioning creditor. The simple question here is, Has there been extortion? It is said on behalf of the debtor that if the result of the arrangement is that the petitioning creditor gets more than the 4 per cent. interest he would have got by proceeding with his petition, that is extortion. But there was nothing of the kind in this case, and so the registrar has found upon the evidence.

[RIGBY L.J. If you got a bonus as a consideration for an adjournment of the petition, that would be strongly against you.]

No doubt; but here there was a fresh debt. *Re G.* (1) was a totally different case: extortion had been proved. The principle is rightly laid down in *In re Atkinson* (2) and *In re Otway* (3), and the only question is whether the facts of

(1) 44 Sol. J. 345.

(2) 9 Morell, 193.

(3) [1895] 1 Q. B. 812.

this case bring it within that principle. It is incorrect to say that, whenever the petitioning creditor gets something more than the interest he would get by going on with his petition, that is an abuse of the process of the Court. Here both petitions were presented bonâ fide, which was not the case in *Re G.* (1) Here there was no undue pressure on the debtor: the proposals for arrangement in fact came first from him, not from the creditor.

[RIGBY L.J. Much might depend upon the reply made by the creditor to the debtor's proposals. The creditor might take advantage of the debtor's proposals to put pressure upon him.]

There is no evidence of pressure here, and so the registrar has held.

H. Reed, Q.C., in reply. The Court was left in absolute ignorance of the agreement between the parties; and before a petition can be withdrawn the Court ought to be informed of the terms of withdrawal. In one sense, no doubt, the first petition was presented bonâ fide, because the creditor wanted his money. Having succeeded on the first petition, he no doubt thought he would be equally successful on the second. It is just as much extortion to allow a petition to be adjourned or dismissed on terms proposed by the debtor, as on terms proposed by the creditor, for the debtor is not a free agent; he is in the power of the creditor. No such distinction was drawn in the old composition cases. The effect is that the creditor is using the process of the Court, not for the legitimate purpose of administering the estate of the debtor, but to obtain payment of an increased debt. A bankruptcy petition can only be properly used for obtaining administration equally among all the creditors.

WEBSTER M.R. In this case an appeal is brought against a receiving order made by a registrar on May 14 last. It is sought to discharge that order on the ground that the proceedings to which the petitioning creditor has been a party are such that the Court ought, either in fact or in law, to come

(1) 44 Sol. J. 345.

C. A. 1900

BEBRO, *In re.*

Webster M.R.

to the conclusion that the proceedings in bankruptcy by way of petition have been used for the purpose of extorting money. The facts are simple. [The Master of the Rolls stated them, and continued :—]

It is said that the Court should not allow the receiving order to stand, on the ground that there has been an abuse of the process of the Court disentitling the petitioning creditor to a receiving order, because the process of the Court has been used for the purpose of extorting money. The registrar has come to the conclusion that there was no extortion in fact, and we must be satisfied that his conclusion was wrong before we discharge his order. But the matter has been put by Mr. Reed on the higher ground that, although on the evidence the transaction might not be one of extortion but based merely upon the earnest solicitation of the debtor, yet if the result was that the creditor obtained a larger amount than he would have got under the bankruptcy proceedings, that would in law be extortion. Agreeing with the learned registrar, as I do, upon the facts, that there was no extortion exercised by the petitioning creditor, and that the request came from the debtor himself, and believing, as the registrar believed, that the petitioner was willing to take his money without interest—or that at any rate he brought no pressure upon the debtor in order to get a larger amount—I think Mr. Reed's argument must go this length, that if the result of the proceedings is that the petitioner got a larger amount than he would have got under the bankruptcy proceedings, they cannot stand. I think the true view is that taken by Fry L.J. in *In re Atkinson* (1), where he says (2) : " In my opinion, the moment the Court sees the petition is made a means of extorting money, a petitioner should not be able to get a receiving order." I quite agree that it by no means follows that because the solicitation came in the first instance from the debtor there can be no extortion: because, as my brother Rigby L.J. has already pointed out, it might well be that, in his answer to the request of the debtor, the petitioner did in fact put very considerable pressure upon the debtor; but the Court must be satisfied that the bankruptcy proceedings

(1) 9 Morell, 193. (2) 9 Morell, at p. 196.

have been used to extort or get from the debtor a larger amount than the creditor could have lawfully received by means of the proceedings. I quite agree with Mr. Reed's argument that if extortion is once proved the machinery by which it has been effected, whether by getting an adjournment or a dismissal of the petition, makes no difference. If the process of the Court has been used improperly, that is enough to vitiate the arrangement.

It was said that in *Re G.* (1) the Court has decided more than this. As I read the short report of the case, the registrar had there come to the conclusion upon the facts before him that there had been extortion, and this Court did not see its way to reverse his decision and to say there had been no extortion. I see nothing to justify the argument in the present case that any bonâ fide proceeding to get payment from the debtor without undue pressure should be treated as extortion merely because the debt which forms the foundation of a subsequent bankruptcy proceeding is for a larger amount than the petitioning creditor would have obtained under the petition originally presented. The Court of Bankruptcy may perhaps have drifted into a loose system of practice. In my opinion the practice that should be followed is indicated by s. 7 of the Bankruptcy Act, 1883, that is, that no petition should be withdrawn without the leave of the Court, or of the officers of the Court, such leave to be given only after an exercise of judgment as to whether the case is a proper one for withdrawal. If that judgment is exercised properly, it would be wrong, in my opinion, to hold that an honest debtor should not be allowed to rehabilitate himself in trade by coming to an arrangement with his creditor, assuming that there is no extortion on the part of the creditor.

In my opinion the decision of the registrar was right, and therefore the appeal should be dismissed.

RIGBY L.J. I come to the same conclusion as the Master of the Rolls, and I agree with what he has said. If I were to come to a different conclusion from that which I do upon the

(1) 44 Sol. J. 345.

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BEBRO, *In re.*

Rigby L.J.

evidence, I should feel doubtful as to overruling the decision of the registrar, who has seen the witnesses and knows more about the case than I do. But I think I ought not to take a different view, and I should not have done so if the case had come before me in the first instance. We must go upon this. The first petition was presented with the bonâ fide object of putting the bankruptcy law in force for the recovery of a debt. There was no departure from that object from first to last; but, at the instance of the debtor, terms that were not unreasonable were come to, under which there was a dismissal of the petition. Now, if the petitioning creditor had obtained that dismissal upon statements that were untrue in several points and exaggerated in others, the Court would find it difficult to decide in his favour, and for my part I should have no desire so to decide upon the slight remnant of facts that might remain in a case founded on deceit. Mr. Reed says we ought to infer that, having made a good thing out of the dismissal of one petition, the creditor was doing the same thing on the second petition, and would do it over and over again. If he did so, I think the registrar would have hesitated in coming to the conclusion that he was a perfectly bonâ fide creditor. He would probably have taken the view that the creditor had found out a good way of getting money and that he was practising it as a system. I do not find any fact in the conduct of the petitioning creditor to enable the debtor to say that he had been imposed upon and subjected to extortion. That being so, the appeal ought to be dismissed.

I quite agree with what the Master of the Rolls has said about *Re G.* (1) There the registrar had in fact come to the conclusion that there was extortion; and, speaking for myself, I may say—and I think I am not wrong in saying that my opinion in that case was shared by the other members of the Court—that we thought we could not possibly take a different view from that which the registrar had taken; and we proceeded on that ground only, namely, that there had been de facto extortion. Mr. Reed says this is substantially the same case as that, and that the fact of one creditor getting payment

(1) 44 Sol. J. 345.

of a larger proportion of his debt than the other creditors would get upon theirs would lead to the inference that there had been extortion. Certainly, as a rule, that may be so: the one creditor is trying to defraud the other creditors, and I should have no hesitation in saying that, whether the proposal for such an arrangement came from the debtor or the creditor, it would be a case of extortion in law. Each case must be carefully examined into, and the Court must decide upon the facts arising out of such examination.

COLLINS L.J. I am of the same opinion. I think the case raises a question of some importance, but, in my opinion, the Court has not yet gone far enough to justify us in adopting Mr. Reed's contention. I thought, on looking at the full note with which we have now been supplied of Mr. Registrar Hope's judgment in *Re G.* (1), that the registrar was intending to submit for the decision of the Court of Appeal a larger question than the simple one whether a creditor could use the process of the Court for the purpose of extortion. I thought he was submitting a larger question—one of principle; but on looking at the short report of the case before this Court, the Court seems to have shrunk from deciding the question of principle apparently suggested by the registrar, and to have decided the case simply on the ground of extortion. In the earlier part of his judgment he suggested a broader ground. He said it seemed to him that the effect of what had been done was to use the process of the Court, which was intended for the distribution of the assets among all existing creditors, in such a manner that the petitioning creditor substituted for a judgment debt bearing interest at 4 per cent. a new debt bearing interest at 50 per cent.; that is, that he attempted to get money in excess of his existing debt by means of the petition in bankruptcy. That shadows out the ground on which Mr. Reed was driven to argue the present case—that it was contrary to the policy of the bankruptcy law that a creditor should obtain an advantage for himself by a bargain with the debtor to withdraw the petition; and that primâ facie

(1) 44 Sol. J. 345.

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the fact of the creditor receiving an advantage debars him afterwards from using the new debt as the basis of a petition unless he can shew that the agreement on which the dismissal of the original petition was founded had received the sanction of the Court. Such a practice, no doubt, might be salutary; and it may be that the Legislature would be justified in going further than it has gone, and making it impossible to get a petition in bankruptcy dismissed by consent without the Court being acquainted with all the facts; but, as it stands at present, I think the law has not gone far enough to reach and invalidate a transaction of this kind. It is a question of policy, and the decided cases do not go so far as that: they go simply upon the question of extortion at common law; if the transaction is one of extortion, it fails. Here it is shewn that there has been no extortion. The registrar has found that the pressure, if there was any, came from the debtor and not from the creditor, and so there has been no extortion at common law. The cases cited by Mr. Reed went on a larger principle, which I do not think has as yet been applied to cases like that now before us.

Appeal dismissed.

Solicitors: *B. Barnett; J. J. Hands.*

G. I. F. C.

In re VAUTIN.
Ex parte SAFFERY.

1900
May 28, 29.

Bankruptcy — Fraudulent Preference — Money lent for a Special Purpose —Repayment after Act of Bankruptcy—Dominant View of Debtor — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

When a debtor with bankruptcy impending pays a creditor in the honest belief on reasonable grounds that he is legally bound to make the payment, it is not a fraudulent preference even although the debtor is in fact under no legal obligation to make the payment.

THIS was an application by the trustee in bankruptcy that raised the question whether the payment of a sum of money by the bankrupt to a creditor was a fraudulent preference under these circumstances.

On October 27, 1898, C. Vautin, who had large dealings on the Stock Exchange and was hard pressed for money, applied to Mr. Turner, who was managing director of a financial company, for a loan of 4000*l.* Turner, on behalf of his company, lent Vautin 3000*l.* on certain security; but Vautin said it was not enough, and that it was necessary he should have 4000*l.* in order to enable him to discharge the whole of his then current liabilities; and on his distinct representation and assurance that the further sum of 1000*l.* would be sufficient to clear up all his debts and make him a free man, Turner agreed to lend him the 1000*l.* for that purpose, and handed him his cheque for that amount. Vautin was the same day to deposit with Turner certain shares as security for the 1000*l.*, and to repay the money as soon as possible, but no particular date was fixed for repayment.

Vautin cashed the cheque at once, but did not apply the proceeds in payment of his debts. In the afternoon of the same day he absconded, thereby committing an act of bankruptcy. In the evening of the same day he posted a letter to Turner containing two 500*l.* Bank of England notes, and stating that he returned the money. Turner received the letter

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and notes on the morning of October 28 without notice of any act of bankruptcy committed by Vautin.

On November 1 a receiving order was made against Vautin on a creditor's petition grounded on the act of bankruptcy committed on October 27, and adjudication followed, and J. Saffery became the trustee in the bankruptcy. The trustee now claimed a declaration that the payment of the 1000*l.* to Turner was under the circumstances a fraudulent preference, and an order on Turner for its repayment.

There was no evidence to shew that the two bank-notes were the proceeds of the cheque.

Muir Mackenzie and *H. Kisch*, for the trustee. Under the circumstances the repayment of the money was a fraudulent preference. The onus is on the other side to shew that it was not. Vautin was not a trustee of the money for Turner, and was under no legal obligation to repay it. Payment from conscientious motives or under a sense of honour is not sufficient: *Re Rogers* (1); *Re Fletcher* (2); *In re Blackburn & Co.* (3)

Reed, Q.C., and *Carrington*, for Turner. Fraudulent preference depends on what passes in the mind of the party making the payment at the time it is made. If he acts in pursuance of a contract or engagement, or otherwise under such circumstances that he cannot have a choice, the payment is not the result of a preference: *Vacher* v. *Cocks* (4); *Edwards* v. *Glyn* (5); *Bills* v. *Smith.* (6) Here the money was lent for a specific purpose under a contract, and repaid by Vautin under an obligation which the law imported and to save him from the consequences of misappropriation: *Toovey* v. *Milne* (7); *Sharp* v. *Jackson.* (8) It would have been misappropriation for Vautin to apply the money for any other purpose than that for which it was advanced.

H. Kisch, in reply. No legal obligation to repay is shewn by the evidence.

(1) (1891) 8 Mor. 243.
(2) (1891) 9 Mor. 8.
(3) [1899] 2 Ch. 725.
(4) (1830) 1 B. & Ad. 145.
(5) (1859) 28 L. J. (Q.B.) 350.
(6) (1865) 34 L. J. (Q.B.) 68.
(7) (1819) 2 B. & A. 683.
(8) [1899] A. C. 419.

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WRIGHT J. In this case it seems to me that there are more grounds than one upon which the application fails. In the first place, I come to the conclusion of fact upon the evidence that the bargain between the parties was in substance that this 1000*l.* should be advanced by Turner by way of supplement to the 3000*l.* which was advanced by the financial company for the express purpose that it should be used with the 3000*l.* for clearing off the liabilities of the debtor and making him a free man, and for that purpose only. I accept Mr. Turner's statement that it was part of the understanding between the parties, although he does not allege that it was expressly mentioned, that if that were found impracticable the money was to be returned. Mr. Turner has not been cross-examined, and I am the more disposed to give credence to his evidence because, when the matter was expressly brought to his mind as to whether there was any actual promise to return the money if it could not be applied as intended, he had the candour to say that he did not recollect anything of the sort having been expressly mentioned. If that was the understanding, it seems to me that the case is brought within the authority of *Toovey* v. *Milne* (1), a case which has been recognised in *Re Rogers* (2) and in the leading case of *Bills* v. *Smith* (3), and in several other cases. And, in addition to that, I think it not at all immaterial to observe that, if Mr. Turner's statement is correct, part of the contract was that pari passu with the advance of the money there should be a security on shares which the bankrupt was to sell that day for the purpose of providing the security, and he was not to have the money except on the terms that he gave that security. If he did not sell the shares, and consequently did not give the security, instead of giving the security he was to return the money. I think that strengthens the view very much that the real nature of the transaction was that the money should be returned unless in all respects the intention of the parties could be carried out. If that is the case, even though the trustee should be held entitled to this money, he would come under a liability to

(1) 2 B. & A. 683. (2) 8 Mor. 243.
(3) 34 L. J. (Q.B.) 68.

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give effect to the arrangement that security was to be given. However that may be, I think the trustee fails on the other ground, namely, the ground of fraudulent preference, as well as on the ground—which is a distinct ground—that the money was advanced for a specific purpose, and did not form part of the general assets of the bankrupt. I think the case as to fraudulent preference fails, because, on the facts as they are stated by Mr. Turner, I come to the conclusion that it is not shewn by the trustee that the dominant view with which the 1000*l.* was repaid was to prefer Mr. Turner. I arrive at that conclusion upon this ground—a ground which, I think, goes somewhat beyond any decided cases—and I state it plainly in order that, if I have gone wrong, I may be set right:—I draw the conclusion from the evidence that the bankrupt, when he made the repayment of the 1000*l.* to Mr. Turner, did so in the belief, on reasonable grounds, that he was bound by contract to return the money. I say I doubt if any case goes so far as I am going now, but whether there was a legal contract effected or not, I think the cases justify me in holding that if the bankrupt in good faith and on reasonable grounds believed he was legally bound, then, even if he was not legally bound, that prevents the payment being a fraudulent preference, because it prevents the preference being the dominant view. I think that doctrine is justified by what is said by the Court in *Bills* v. *Smith* (1), as well as by the judgment of the Court of Appeal in *New, Prance and Garrard's Trustee* v. *Hunting* (2) and by the House of Lords in *Sharp* v. *Jackson.* (3) I think, therefore, that this application fails, and must be dismissed with costs.

Solicitors for trustee: *Beyfus & Beyfus.*

Solicitors for Mr. Turner: *Ashurst, Morris & Co.*

(1) 34 L. J. (Q.B.) 68. (2) [1897] 2 Q. B. 19.
(3) [1899] A. C. 419.

H. L. F.

In re PHILLIPS.
Ex parte BARTON.

1900
May 14.

Bankruptcy—Act of Bankruptcy—Assignment of whole Property—Assignment by Partners for Benefit of Trade Creditors only—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*).

By s. 4, sub-s. 1, of the Bankruptcy Act, 1883, a debtor commits an act of bankruptcy if (*a*) "he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally":—

Held, that an assignment by a debtor for the benefit of his trade creditors only was not an act of bankruptcy under clause (*a*).

APPEAL from the decision of the registrar of the Cheltenham County Court making a receiving order against the debtor, E. J. Phillips.

In January, 1900, Phillips and H. A. Marsh were trading as partners under the firm name of "Phillips & Marsh," in the business of livery-stable keepers carried on at Cheltenham.

By a deed of assignment dated January 23, 1900, the firm of Phillips & Marsh assigned, as beneficial owners, to a trustee all "the stock-in-trade, book debts, credits, chattels, and effects belonging or owing to the said firm in connection with their business of livery-stable proprietors" upon trust to call in and convert into money the premises thereby assigned, and after paying certain incidental expenses and preferential debts, to divide the residue among the trade creditors of the firm, who were made parties to the deed, and whose names were set forth in a schedule thereto. The property assigned by the deed comprised the whole of E. J. Phillips' assets.

Phillips, upon entering into the partnership with Marsh, had borrowed a sum of money from bankers in order to provide capital for the business, and Joseph Barton became surety for the repayment of part of that sum to the bankers.

On February 8, 1900, Barton, having been compelled to pay a sum of 300*l.* to the bankers under his contract of suretyship, recovered judgment for that sum in an action against Phillips. On February 21 Barton presented a bankruptcy

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petition against Phillips in the Cheltenham County Court. The petition alleged "that the said E. J. Phillips, within three months before the date of the presentation of this petition, has committed the following act of bankruptcy—namely, that on the 23rd day of January, 1900, he made a conveyance or assignment of his property to a trustee (jointly with his co-partner in trade) for the benefit of his creditors generally."

On the hearing of the petition the registrar held that the making of the deed of assignment was an act of bankruptcy committed by the debtor Phillips, and made a receiving order against him.

Phillips appealed.

A. R. Butterworth, for the appellant. The appellant did not commit the act of bankruptcy alleged in the petition, and the receiving order ought not to have been made. An assignment for the benefit of one particular class of a debtor's creditors is not an assignment "for the benefit of his creditors generally" within the meaning of s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). "Creditors generally" means all the creditors. The word "creditors" alone, in s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), was held to mean all creditors: *Ex parte Glen, In re Glen* (1); *Tomlin* v. *Dutton.* (2) The assignment would be no answer to an action against the debtor, Phillips, for a separate debt owed by him: *European Central Ry. Co.* v. *Westall.* (3)

A. J. David, for the respondent, the petitioning creditor. The assignment was an act of bankruptcy by the debtor, Phillips. The partnership creditors could have presented a petition in bankruptcy upon it. It was a joint act of bankruptcy by the partners, and a petition could be presented against either of them. It was an assignment of all the effects of the firm with a view to delay creditors and to evade the bankruptcy laws, and was, therefore, an act of bankruptcy: *Stewart* v. *Moody* (4); *Bowker* v. *Burdekin* (5), Lord Abin-

(1) (1867) L. R. 2 Ch. 670.
(2) (1868) L. R. 3 Q. B. 466.
(3) (1865) L. R. 1 Q. B. 167.
(4) (1835) 1 C. M. & R. 777.
(5) (1843) 11 M. & W. 128, at p. 144.

ger C.B.; *Ex parte Snowball, In re Douglas* (1), Mellish L.J. An assignment "for the benefit of creditors generally" does not necessarily mean an assignment for the benefit of all the creditors. This assignment was, at any rate, a fraudulent conveyance or fraudulent preference under clauses (*b*) or (*c*) of s. 4, sub-s. 1, of the Bankruptcy Act, 1883, and the case should be remitted to the registrar to amend the petition and decide whether there has been an act of bankruptcy under those clauses.

A. R. Butterworth replied.

WRIGHT J. There is no direct authority on this question, although I think the enactment is a repetition of the words in the Bankruptcy Act of 1869. On the whole it seems to me safest to follow the language of s. 4, sub-s. 1 (*a*), of the Act of 1883, and to hold that the words mean an assignment which is not limited to any particular class of creditors. The object was to bring within the operation of the Act assignments which could not be attacked on the ground that they were a fraudulent preference, but which might be attacked on the ground that they had a similar effect to bankruptcy—namely, that they were intended to bring about the division of all the debtor's property among his creditors. The clause was aimed at such assignments and such only. I think, therefore, that the act of bankruptcy alleged in the petition was not committed, and that the receiving order ought not to have been made. I see no reason, however, why the petitioner should be shut out from alleging that the assignment was an act of bankruptcy under clauses (*b*) or (*c*), nor why the petition should not be amended to enable him to do so.

DARLING J. I am of the same opinion. I also do not see why, if another act of bankruptcy can be alleged, the petition should not be amended. I am of opinion, however, that the act of bankruptcy which is alleged has not been committed. This was an assignment for the benefit of some of the creditors, and if we were to say that the act of bankruptcy was properly

(1) (1872) L. R. 7 Ch. 534, at p. 547.

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Darling J.

alleged in the petition, we should be saying that the word "generally" meant nothing. I think it means *all* the creditors if it means anything. There is no direct authority on the matter, but our decision is, I think, consistent with the reasoning in *Ex parte Glen* (1) and *Tomlin* v. *Dutton*. (2) In *Tomlin* v. *Dutton* (3) Blackburn J. said that in *Ex parte Glen* (1) the ground of the decision was that s. 192 of the Bankruptcy Act, 1861, by "creditors" meant "all the creditors whether joint or separate." If the word "creditors" standing alone means "all the creditors whether joint or separate," the word "generally" in s. 4 of the Act of 1883 certainly does not limit the meaning of the word "creditors." The expression "creditors generally" must either mean "some creditors" or "all the creditors." In my view, whatever it means it does not mean "some." I, therefore, prefer to say that it means "all."

Appeal allowed. Case remitted to the registrar.

Solicitors for appellant: *Goodale & Hobson, for Butterworth, Rose & Morrison, Swindon.*

Solicitors for respondent: *W. H. Martin & Co., for Heath & Eckersall, Cheltenham.*

(1) L. R. 2 Ch. 670. (2) L. R. 3 Q. B. 466.
(3) L. R. 3 Q. B. 466, at p 468.

W. A.

SLEIGH AND OTHERS *v.* TYSER.

1900
May 7, 8, 9, 22.

Insurance, Marine—Seaworthiness—Implied Warranty of.

By a policy of marine insurance on cattle it was provided that the fittings of the ship were to be approved by Lloyd's surveyor. The fittings were in fact so approved. During the voyage a large number of the cattle died, owing partly to the insufficiency of the appliances for ventilation and partly to the insufficient number of cattle-men appointed to attend to them:—

Held, that the ship was unseaworthy in both respects, that the implied warranty of seaworthiness was not excluded by the provision as to the approval of the fittings, and that the underwriters were not liable.

TRIAL before Bigham J. without a jury.

The action was brought on a Lloyd's policy to recover from the defendant his proportion of the amount payable in respect of a loss of cattle shipped at Brisbane in the steamer *Ningchow* for carriage to Lourenço Marques in Delagoa Bay. The defence was that the ship was unseaworthy for the carriage of the cargo because of want of proper appliances for ventilation, and because she carried an insufficient number of cattlemen to attend to the beasts. The reply to that defence consisted of a denial of the unseaworthiness, and of an allegation that the implied warranty of seaworthiness was excluded by the express terms of the policy.

The policy was dated February 10, 1899. The subject-matter of the insurance was described as "500 cattle valued at 14*l.* each." The insurance was expressed to cover "all risks of shipping, unloading craft, &c., until safely landed; all risks including mortality and jettison arising from any cause whatever; animals walking ashore or, when slung from the vessel, walking after being taken out of the slings and landed, to be deemed arrived, and no claim to attach to this policy on such animals. Each animal to be deemed a separate insurance. Fittings and condition of cattle to be approved by Lloyd's agent's surveyor."

The *Ningchow* had been chartered by the plaintiffs under a

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time charter which provided that the owners of the ship were to allow the charterers to erect and secure stock and extra passenger fittings, and were to provide accommodation for not exceeding twelve stockmen, the charterers paying the owners 2*s*. per man per day for victualling the number carried.

The shipment of the cattle began on February 20, 1899, and finished on the 22nd, 438 beasts being put on board. Of this number 88 were put on an orlop deck which was laid at the bottom of the vessel, 180 were put on the 'tween decks, and 170 were put on the main deck. Above the cattle on the main deck 1000 sheep were carried on a temporary staging erected for the purpose. The animals were in the charge of a body of about fourteen stockmen furnished by the plaintiffs. There was evidence that this number was below the minimum allowance of men recognised in the trade. Before the vessel arrived at Lourenço Marques practically all the cattle on the 'tween decks had died, and over 30 per cent. of the cattle on the orlop and main decks had met the same fate. Only 185 beasts out of the whole number were landed alive at the port of destination. This mortality, about 60 per cent., was, as the judge found, due to insufficient ventilation and insufficiency of cattle-men. Lloyd's agent's surveyor at Brisbane certified that he had attended on board the *Ningchow* and had examined the fittings both for cattle and sheep on the orlop, 'tween, and main decks, and found that they were well and substantially constructed, that the ventilation of the 'tween and orlop decks had appeared to be somewhat defective, but had since been remedied to a great extent by a forced draught from the blowers, which were tried in his presence and found to be fairly effective.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the plaintiffs. There was no implied warranty in the policy that the ship should be seaworthy in respect of the possession of sufficient appliances for ventilation. The implication of such a warranty is excluded by the provision that the fittings and condition of the cattle were to be approved by Lloyd's agent's surveyor. The term "fittings" includes ventilating appliances, and they

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were in fact duly approved by the surveyor. The express condition as to the approval of the surveyor was intended to limit the liability of the assured. As was said by Buller J. in *Toussaint* v. *Martinnant* (1), "Promises in law only exist where there is no express stipulation between the parties." For instance, if goods are sold by sample it is enough if they agree with the sample; it is not necessary that they should be of merchantable quality, for the express warranty by sample excludes an implied warranty as to all such matters as can be judged of by the sample: *Mody* v. *Gregson* (2); *Dickson* v. *Zizinia*. (3) With regard to the alleged insufficiency of the cattle-men, it has no bearing upon the implied warranty of seaworthiness, for it would not constitute unseaworthiness of the ship. There is no implied warranty that a cargo is fit for the voyage. And the cattle-men, like the cattle, were part of the cargo. They were no part of the ship. In *Owners of Cargo on Ship "Maori King"* v. *Hughes* (4), where a cargo of frozen meat was shipped for carriage in a frozen condition from Melbourne to London, it was held that the shipowners were liable for injury to the cargo by reason of a breakdown of the refrigerating machinery, as upon breach of an implied warranty of seaworthiness. But there the machinery was really part of the ship in the sense that it was connected with the ship as being something that the shipowners undertook to supply. Here the cattle-men were supplied, not by the shipowners, but by the shippers of the cargo.

Robson, Q.C., *Scrutton*, and *Mackinnon*, for the defendants. The implied warranty of seaworthiness which primâ facie every policy contains can only be excluded by express terms. "If there is an intention to exclude that implied warranty it ought to be expressed in plain language": per Lord Penzance, *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*. (5) The condition as to the approval of the fittings by Lloyd's surveyor is not an expression of any such intention. It is intended as an additional protection to the underwriters.

(1) (1787) 2 T. R. 100, at p. 105.
(2) (1868) L. R. 4 Ex. 49.
(3) (1851) 10 C. B. 602.
(4) [1895] 2 Q. B. 550.
(5) (1870) L. R. 3 P. C. 234, at p. 242.

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There was therefore a breach of the implied warranty of seaworthiness in the insufficiency of the ventilation. Further, the ship was, by reason of the insufficiency of the cattle-men, unseaworthy in relation to the cargo that was being carried. The case is analogous to that of the men who are required on board a grain ship to turn the grain over in the hold to prevent its heating. A ship which did not carry a sufficient number of such men could not be said to be seaworthy in relation to a grain cargo.

Walton, Q.C., in reply.

Cur. adv. vult.

May 22. BIGHAM J., having stated the facts as above set out and his findings upon them, proceeded as follows:—The question then arises whether insufficient ventilation and an insufficient supply of men constitute a breach of the implied warranty—or, more correctly, the implied condition—of seaworthiness. I think they do. What is the implied warranty in a policy on cargo? It is, in my opinion, exactly the same as the warranty in a policy on ship—that the ship shall be seaworthy for the adventure on which she starts. Stating the warranty with particular reference to a policy on cargo, it may be defined as a warranty—or rather as a condition—that the ship shall be fit for the proposed service—fit, that is, in respect of all those things that appertain to the safe carriage of the cargo in question to its destination. No doubt it is not usual for underwriters on cargo to rely on the defence of unseaworthiness; the underwriter generally pays the cargo owner and avails himself of the latter's rights against the shipowner, the benefit of which he obtains by subrogation: McArthur's Contract of Marine Insurance, 2nd ed. p. 15, note (*c*). But this is because of the supposed hardship of the law which makes innocent shippers of cargo responsible for the oversight or neglect of the shipowner. The practice does not modify the law; and in the present case the hardship out of which the practice has sprung does not exist, for the plaintiffs had themselves undertaken with the shipowners to provide both the ventilation appliances and the cattle-men.

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Then were proper ventilation and a sufficient number of men to attend on the beasts things which were required on board this vessel for the safe carriage of the cargo to its destination? I am clearly of opinion that they were. Many cargoes besides cargoes of living animals require ventilation if they are to be carried safely, and it cannot be doubted that a ship which put to sea without proper means of providing the necessary ventilation, or without sufficient men to utilise those means, would be unseaworthy for the service required.

But it is said in this case that the implied warranty is gone by reason of the express words in the policy to which I have already referred—"the fittings and condition of the cattle to be approved by Lloyd's agent's surveyor." They were in a somewhat halting way so approved; the certificate of the surveyor has been read, and in my opinion it is a certificate which sufficiently complies with the requirements of the clause. It is argued on the plaintiffs' behalf that their compliance with that express provision of the contract discharges them from further obligation. I do not, however, think so. The certificate has nothing to do with the sufficiency of men shipped on board to attend to the cattle. With that matter Lloyd's surveyor did not concern himself. And though ventilation appliances may well come within the meaning of the word "fittings," the question remains whether the parties intended, by this stipulation that the fittings should be approved by Lloyd's agent, to supersede the implied warranty of seaworthiness in respect of ventilation. I am of opinion that they did not. I think this stipulation was inserted in the policy for the benefit of the underwriters, and was intended to be additional to and not in substitution for the important condition upon the basis of which all contracts of this description are primâ facie made. It may be asked, What additional advantage does the stipulation give to the underwriter? I think the answer is that it probably enables him to reinsure with greater ease, and it affords him some assurance that he will not find himself involved in an action such as this. To exclude the implied warranty of seaworthiness the words used must be express, pertinent, and

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apposite: per Lord Penzance in *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada.* (1) If I could find in these words sufficient to satisfy me that the parties intended that Lloyd's surveyor should be put in the position of a sole judge to decide once for all whether the fittings were enough for the purpose required, I should probably come to a different conclusion as to the intention of the parties in introducing the stipulation relied on. But I do not find anything of the kind. The stipulation is, in my opinion, merely superadded for the benefit of the underwriter, and therefore does not exclude the implied warranty: see *Mody* v. *Gregson.* (2)

A question was raised by me during the hearing of the case as to the effect of the clause in the policy by which each animal is to be deemed a separate subject of insurance. But I think nothing turns on the clause. It is inserted with a view to qualifying the liability for particular average, and with that view only.

Judgment for defendants.

Solicitor for plaintiffs: *J. Ballantyne.*

Solicitors for defendants: *Parker, Garrett & Holman.*

(1) L. R. 3 P. C. 234, at p. 242. (2) L. R. 4 Ex. 49, at p. 53.

J. F. C.

[IN THE COMMERCIAL COURT.]

1900
May 25, 28;
June 1.

DRIEFONTEIN CONSOLIDATED GOLD MINES, LIMITED *v.* JANSON.
WEST RAND CENTRAL GOLD MINES COMPANY, LIMITED *v.* DE ROUGEMONT.

Insurance, Marine—Capture—Property of Alien Enemy—Existing State of War—Intention to wage War—Seizure by belligerent Government of Property of its own Subjects—Contract of Indemnity—Validity.

The principle of law which invalidates insurance of an alien enemy's property does not apply to insurance against seizure by a belligerent government of the property of its own subjects.

Gold, the property of a company carrying on business in the Transvaal, was insured with British underwriters, by a policy containing a clause against capture, for transit from mines in the Transvaal to the United Kingdom, and during transit was seized by the Transvaal Government. The policy was made, and the loss occurred, before the actual commencement of hostilities between Her Majesty's Government and the Transvaal. The company sued on the policy, and the underwriters defended on the ground that the plaintiffs were alien enemies, and the loss was by arrest, restraint, or detainment by the Transvaal Government, incidental to actual or expected hostilities against Her Majesty, and made for a purpose connected therewith, namely, to supply that Government with funds with which to levy war on Her Majesty. It was agreed that no dilatory plea should be set up based upon the fact that the plaintiff company was alien and could not sue while the war lasted, but the case should be dealt with as if the war were over:—

Held, that the intention of the Transvaal Government to wage war subsequently could not be treated as creating an actual state of war, and that the commencement of the war, which took place a few days later, could not have the effect of making the seizure a hostile act:

Held, also, that the subsequent breaking out of war did not invalidate the contract of insurance, and the plaintiffs were entitled to recover.

In these cases two actions were brought by the two plaintiff companies against underwriters at Lloyd's to recover in respect of a loss of gold, which had been seized by order of the Government of the South African Republic, while in transit from the mines at Johannesburg in the Transvaal to the United Kingdom. The plaintiff company in the first case was registered under the law of the South African Republic, that in the

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second case under the English Companies Acts. The facts relating to the seizure of the gold, and to the commencement of the war between Great Britain and the South African Republic, so far as material for the purpose of this report, and the points in which the two cases differed from one another, are sufficiently stated in the judgment of Mathew J.

The same counsel and solicitors represented the plaintiffs and defendants respectively in both cases.

The actions were tried in the Commercial Court before Mathew J. without a jury on May 25 and 28, 1900.

Lawson Walton, Q.C., and *Carver, Q.C.* (*Scrutton* with them), for the plaintiffs. The substance of the defendants' contention is that the contracts of indemnity, on which the claims of the plaintiffs are based, cannot be enforced, because the losses were caused by the acts of a belligerent foreign power, or at least of a foreign power contemplating and intending a war with this country, the acts in question being done with a view to carrying on that war effectually. The evidence negatives the suggestion that a state of war in fact existed at the time of the losses, and the authorities shew that, in order to support such a defence, a state of war existing at the time of the loss must be proved. The seizure itself was not an act of war, and never was so treated. The war which afterwards broke out cannot be regarded as relating back to the date of the seizure. The contracts were entered into, and the losses took place, before the war broke out, and the plaintiffs in each case therefore have a good cause of action.

Joseph Walton, Q.C., and *Lord Robert Cecil, Q.C.* (*J. A. Hamilton* with them), for the defendants. The act of seizure in itself is an act of hostility, but it is unnecessary to shew that a state of war existed at the date of the loss, for the policy of English insurance law is to invalidate all contracts to indemnify against loss caused by an act done for the purpose of carrying on war against this country, whether the loss occurred before or after the actual commencement of hostilities. This is shewn by the authorities on the law of marine insurance relating to capture. A British subject cannot lawfully contract

to contribute to a war carried on against Great Britain, or to diminish the loss imposed on the enemy by stress of war. The contracts on which the plaintiffs are claiming are in effect contracts for these purposes. In the second case, as well as in the first, the plaintiffs carry on their business in the territory of the South African Republic, and therefore both companies in their corporate capacity are identified with the Government of that Republic, and for the purposes of these actions ought to be treated as alien enemies, and are not entitled to recover.

[The following decisions and passages from text-books were referred to and discussed in the course of the argument: *The Negotie en Zeevaart* (1); *The Danckebaar Africaan* (2); *The Herstelder* (3); *The Hoop* (4); *The Packet de Bilboa* (5); *Potts* v. *Bell* (6); *The Citto* (7); *M'Connell* v. *Hector* (8); *Furtado* v. *Rogers* (9); *Kellner* v. *Le Mesurier* (10); *Gamba* v. *Le Mesurier* (11); *Brandon* v. *Curling* (12); *The Boedes Lust* (13); *The Abby* (14); *The Jonge Klassina* (15); *Toulmin* v. *Inglis* (16); *Conway* v. *Gray* (17); *Flindt* v. *Waters* (18); *The Success* (19); *Society for the Propagation of the Gospel* v. *Wheeler* (20); *Campbell* v. *Innes* (21); *The Ionian Ships* (22); *Lozano* v. *Janson* (23); *Aubert* v. *Gray* (24); *Nordenfelt* v. *Maxim*

(1) (1782) In House of Lords; unreported; cited in the next case.
(2) (1798) 1 Chr. Rob. 107.
(3) (1799) 1 Chr. Rob. 114.
(4) (1799) 1 Chr. Rob. 196.
(5) (1799) 2 Chr. Rob. 133; Tudor's Merc. and Mar. Cas. 3rd ed. 921.
(6) (1800) 8 T. R. 548; 5 R. R. 452.
(7) (1800) 3 Chr. Rob. 38.
(8) (1802) 3 B. & P. 113; 6 R. R. 724.
(9) (1802) 3 B. & P. 191; 6 R. R. 752.
(10) (1803) 4 East, 396; 7 R. R. 581.
(11) (1803) 4 East, 407; 7 R. R. 590.
(12) (1803) 4 East, 410; 7 R. R. 592.
(13) (1804) 5 Chr. Rob. 233.
(14) (1804) 5 Chr. Rob. 251.
(15) (1804) 5 Chr. Rob. 297.
(16) (1808) 1 Camp. 421; 10 R. R. 715.
(17) (1809) 10 East, 536; overruled in *Aubert* v. *Gray*, (1862) 3 B. & S. 169.
(18) (1812) 15 East, 260; 13 R. R. 457.
(19) (1812) 1 Dodson, 131.
(20) (1814) 2 Gallison U. S. 105, at pp. 130, 131.
(21) (1821) 4 B. & A. 423; 23 R. R. 328.
(22) (1855) Spinks' Prize Court Cases, Part I. p. 193.
(23) (1859) 2 E. & E. 160, at p. 176.
(24) (1862) 3 B. & S. 169, at p. 182.

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Nordenfelt Guns and Ammunition Co. (1); *San Paulo (Brazilian) Ry. Co.* v. *Carter* (2); *Reg.* v. *Jameson* (3); *Hyderabad (Deccan) Co.* v. *Willoughby* (4); Arnould on Marine Insurance, 6th ed. pp. 131–135, 701–703; Dicey on Conflict of Laws, p. 154; 1 Duer on Marine Insurance, pp. 414, 555; Hall on International Law, 4th ed. p. 63, s. 15; Manning on the Law of Nations, edition of 1875, p. 131; Park on Insurance, 8th ed. p. 524; Phillips on Insurance, s. 223; Risley on the Law of War, pp. 97, 98, 141.]

Cur. adv. vult.

DRIEFONTEIN CONSOLIDATED GOLD MINES, LIMITED *v.* JANSON.

June 1. Judgment in the two cases was delivered by

MATHEW J. This was an action brought by the plaintiff company against underwriters at Lloyd's to recover a loss by capture of bullion while in transit from Johannesburg to the United Kingdom. The policy contained the usual clause against capture. The facts were these. The gold was despatched from Johannesburg on October 2, 1899, and while being carried by train it was seized at the frontier of the Transvaal by the orders of the Transvaal Government. On October 9 an ultimatum was issued by the Transvaal Government to the British Government, announcing that if certain demands contained in the communication were not complied with, the conduct of the English Government would be treated as a declaration of war at 5 o'clock on the afternoon of October 11.

The gold was taken absolutely out of the control and possession of the plaintiff company, and a demand was made upon the underwriters for payment of the amount of the loss. The underwriters refused to pay on the grounds stated in their points of defence, which were as follows:—

"The plaintiffs are a limited company incorporated according to the laws of, and domiciled within the territories of, the

(1) [1894] A. C. 535, at pp. 553, 554.

(2) [1896] A. C. 31.

(3) (1896) 12 Times Rep. 551, at p. 589.

(4) [1899] 2 Q. B. 530.

present South African Republic, and are alien enemies of Her Majesty, and the loss, if by any peril insured against, was by an arrest, restraint, or detainment by the Government of the present South African Republic incidental to actual or expected hostilities against Her Majesty and made for a purpose connected therewith—namely, to supply the said Government with funds with which to levy war upon Her Majesty, as they were then purposing, and shortly afterwards proceeded, to do, whereby the plaintiffs' claim herein is for an indemnity which is contrary to public policy and is altogether barred and cannot be maintained."

Upon that refusal on the part of the underwriters the action was brought, and it was agreed that the Blue Books published by the Government should be treated as containing evidence of all the facts material to the case, and, further, that no dilatory plea should be set up, based upon the fact that the plaintiff company was alien, and could not sue while the war lasted. The case, it was agreed, should be dealt with as if the war were over.

The first point made for the defendants in the argument before me was this. It was said that it was shewn from what appeared in the Blue Books that the Transvaal Government were on October 2 resolved to go to war, and that the seizure was made to obtain the means of prosecuting the war against the English Government effectively, and the seizure was said to be like an attack actually made by a belligerent power upon an enemy's territory. If that contention is right, all the serious consequences of a state of war would have followed from October 2. If war had then commenced all commercial relations between the subjects of the two Governments must have ceased, as every kind of communication that could relieve the pressure of hostilities would be a violation of duty. I am clear that there was no state of war on October 2. What is a state of war is well described in Hall on International Law, 4th ed. p. 63: "When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the

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combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant." There was no evidence before me of any determination to settle the disputes by force on October 2. The negotiations for peace continued for several days. Both Governments were aware of the seizure of the gold, and neither Government treated it as an act of war. There was no evidence whatever that on October 2 there was any intention to send the sudden ultimatum which was issued on the 9th, and even if there were it seems to me clear that the intention of a belligerent power to wage war subsequently cannot be treated as creating an actual state of war.

Now, if the seizure was not at the time a hostile act creating a state of war, as is my view, and there were no other point, the plaintiffs would clearly be entitled to sue, and to recover for the loss. But a second point was made. It was said that when the war began the seizure, if a neutral act before as between the two Governments, then acquired a hostile character, and the proclamation of war on October 11, it was said, related back to the previous seizure of the 2nd, and the case was therefore to be treated as if the seizure had taken place after war had been declared.

The cases relied upon in support of this contention were *The Herstelder* (1) and *The Boedes Lust* (2), and the seizure was said to resemble an embargo laid upon an alien ship, followed by a declaration of war. In such a case it would not appear to be disputed that the embargo would become a capture. It was said that the seizure of the gold ripened into a capture after the declaration of war. But there is no analogy between a seizure of this sort, made in invitum, which wholly deprives the owners of their property, and an embargo. An embargo leaves the property still in the possession of its owners. Here, as I have said, the property was wholly removed from the possession and control of the plaintiff company. Further, the cases referred to related to the acts of belligerents, and throw no light at all upon a case like the present, where the seizure was by the Transvaal Government of the property of a subject company. There

(1) 1 Chr. Rob. 114. (2) 5 Chr. Rob. 233.

is no authority whatever for this supposed doctrine of relation, or its suggested effect of creating an act of war. On both those points, therefore, the contention of the defendants fails.

But it was said there was a further ground of defence, and this was the main ground relied on. It was said that even if the original seizure was not an act of war, and therefore a right of action would under ordinary circumstances have arisen as soon as the seizure took place, the subsequent war extinguished the liability of the underwriters; and the principle of law contended for was this, that to enforce any contract which operates to protect an enemy's property from the calamities of war is against public policy and illegal. The authorities referred to in support of this supposed principle were the well-known prize cases decided in the early part of this century, *Furtado* v. *Rogers* (1), *Kellner* v. *Le Mesurier* (2), *Gamba* v. *Le Mesurier* (3), and *Brandon* v. *Curling* (4), and, further, the statement of the law in 1 Duer on Marine Insurance, 414. There can be no doubt that it is the law that insurances on ships by English underwriters against British capture are illegal; in the words of Lord Ellenborough: "Where the insurance is upon goods generally a proviso to this effect shall in all cases be considered as engrafted therein, namely, 'Provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer.' Because during the existence of such hostilities the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other." (5) The ground for the rule is stated in the earlier cases, namely, that to permit the insurance would be repugnant to the interest of the State. Capture is intended to weaken the resources of the enemy, and a contract of indemnity would frustrate that purpose. It was said that this principle, disclosed by these authorities, should be developed and extended so as to include this case, and that a further exception should be taken to be

(1) 3 B. & P. 191.
(2) 4 East, 396.
(3) 4 East, 407.
(4) 4 East, 410.
(5) *Brandon* v. *Curling*, 4 East, 410, at p. 417.

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written into the policy, namely, the exception of seizure by a belligerent Government of the property of its own subjects. But there is no authority for this contention. It was said that to pay during the war the amount of the loss to the assured must increase the resources of the belligerent power of which he was a subject. It is unnecessary to consider how far that proposition can be maintained, for no such consideration can arise when the war is over, and it was agreed that this case should be treated as if the war were over. The supposed principle contended for by the defendants would wholly override the well-known rule of law, that where the contract of indemnity and the loss are before the commencement of hostilities, the declaration of war only suspends the remedy while the war lasts. The authorities for that proposition are to be found in *Flindt* v. *Waters* (1) and *Alcinous* v. *Nigreu* (2), and in 1 Duer on Marine Insurance, 444. I am satisfied, therefore, that in the first case my judgment must be for the plaintiff company. I do not deal at length with that which was the subject of protracted argument, but which does not appear to me to be material to my decision. It has been maintained that this company was not an alien company, on the ground that a great majority of its shareholders were French, or German, or subjects of the Queen, and the number of shareholders subjects of the Transvaal was very small; but my opinion is that this trading company, incorporated according to the Transvaal law, must be treated as a Transvaal subject; and that a company can be treated as an alien enemy is shewn by the case referred to by Mr. Joseph Walton, the decision of Story J. in *Society for the Propagation of the Gospel* v. *Wheeler*. (3) In the first case my judgment is for the plaintiff company, with costs.

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As to the second action, the only difference material to be considered between the two cases is the point made on

(1) 15 East, 260. (2) (1854) 4 E. & B. 217.
(3) 2 Gallison U. S. 105.

the part of the defendants, that at the time of the loss the goods were not covered by the policy. That is a question of fact. The course of business between the plaintiff company and the bank in Johannesburg had been from time to time to forward parcels of bullion to be sent on to the United Kingdom, and advances had ordinarily been asked for and granted against the bullion passing through the hands of the bank. The bullion the subject of this action was sent from the mine to the bank, and according to the terms of the policy it was intended to be protected at and from the mine to its destination. The manager had hoped that when the gold reached the bank the advances he wanted would be made, and the goods forwarded in the ordinary course to their destination. By that time it had become known that seizures of gold by the Transvaal Government were taking place, and the manager of the bank refused to make any advance, or to take any responsibility in respect of the forwarding of the goods. It was therefore arranged that the goods should remain in the custody of the manager of the bank, and should not be forwarded without further communication with the plaintiffs. It was said that the goods were never in transit. I am clearly of opinion that they were, on the evidence before me. It was said that there was a deviation, but I am satisfied again that it was the duty of the assured, under the well-known clause of the policy, to take proper steps to safeguard the subject-matter of the insurance, and that the arrangement come to between the plaintiffs' manager and the bank was the best that could be done in the then position of the property in question.

My judgment, therefore, in the second case must follow the judgment in the first, and must be for the plaintiffs for the amount sued for, with costs.

Judgment for the plaintiffs in both cases.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

P. B. H.

C. A.
1900
June 21.

[IN THE COURT OF APPEAL.]

BURGER *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY, LIMITED.

Insurance (Marine)—Collision Clause—Construction—Sum paid "in respect of Injury to such other Ship or Vessel itself"—Expenses of Removal of Wreck.

By a collision clause in a policy of marine insurance on ship the underwriters agreed that, if the ship assured should come into collision with any other ship or vessel, and the assured should in consequence thereof be found liable to pay, and should pay, any sums, not exceeding the value of the ship assured, "in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel," they would pay the assured a certain proportion of the sums so paid, but it was provided that this agreement should not be construed as extending to any sums the assured might become liable to pay in respect of loss of life or personal injury to individuals from any cause whatever.

The ship assured having come into collision with and sunk a tug in a river, commissioners acting under statutory powers removed the wreck, and claimed the expenses of so doing from the tug-owners, who paid them, and recovered the amount so paid in the Court of Admiralty from the assured:—

Held, that the collision clause did not cover the sum so recovered from the assured, inasmuch as it was not paid "in respect of injury to such other ship or vessel itself."

APPEAL from the judgment of Mathew J. in an action tried by him without a jury.

The action was by shipowner against underwriters upon a policy of marine insurance on the plaintiff's ship *Durward* for twelve months from April 1, 1897.

The policy contained a collision clause in the following terms: "And we further agree that, if the ship hereby assured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof be found liable to pay, and shall pay, any sums (not exceeding the value of the ship hereby assured) in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel, we

will severally pay the assured such proportion of three fourth parts of said sums as our respective subscriptions hereto bear to the value of the ship hereby assured . . . . but this agreement is in no case to be construed as extending to any sums the assured may become liable to pay in respect of loss of life or personal injury to individuals from any cause whatever."

During the currency of the policy the *Durward* came into collision with a tug called the *Victory* in the river Tees. The *Victory* was sunk by the collision, and became a wreck. The commissioners for the river Tees, acting under statutory powers, removed the wreck, and claimed the expenses of so doing from the owners of the *Victory*, who paid the same. In an action brought in respect of the collision in the Admiralty Court the *Durward* was held solely to blame for it, and the plaintiff, as her owner, was held liable to pay, and did pay, to the owners of the *Victory* the amount paid by them to the commissioners of the river Tees as aforesaid. The plaintiff claimed from the defendants in the action the defendants' proportion of that sum. The learned judge gave judgment for the plaintiff for the amount claimed.

Carver, *Q.C.*, and *Scrutton*, for the defendants. The words "in respect of injury to such other ship or vessel itself" will not cover the sum in question. The expense of removing the wreck, which was made payable by statute to the Tees Commissioners, cannot be said to be a sum payable in respect of an injury to the ship itself. The proviso excluding liability for sums payable in respect of loss of life or personal injury cannot have the effect of extending the construction of the previous words. There are various forms of collision clauses. In some the words describing the subject-matter of insurance are wider than in this case, and might be construed to cover such sums as those in question. The decisions in England and Scotland are to some extent in conflict on the subject: see *Taylor* v. *Dewar* (1); *Coey* v. *Smith*. (2) In order therefore clearly to exclude the liability for such sums, it has become usual in such cases to insert an express proviso that the clause shall not

(1) (1864) 5 B. & S. 58. (2) (1860) 22 Court of Session Cases (N.S.) 955.

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cover sums payable for removal of obstructions under statutory powers: see *The North Britain* (1); *Tatham, Bromage & Co.* v. *Burr.* (2) In the present case the words describing the subject-matter of insurance cannot be construed so as to include such sums, and therefore there was no need of a proviso to exclude them.

[They also cited *Owners of Steamship Gracie* v. *Owners of Steamship Argentino.* (3)]

Joseph Walton, Q.C., and *J. A. Hamilton*, for the plaintiff. The sum sought to be recovered on the policy comes within the words "in respect of injury to such other ship or vessel." It cannot have been intended by those words to limit the sums covered to the amount of the actual injury to the other ship or vessel itself. The proviso with regard to loss of life and personal injury clearly imports that the previous words cover consequential damages arising from the injury to the other ship. Otherwise no effect can be given to the proviso. It being admittedly not unusual to insert a proviso to exclude such expenses as these, and there being an express proviso excluding other consequential damages, namely, those in respect of loss of life and personal injury, it is submitted that the true construction of the collision clause is that it was intended to cover such sums as those claimed. If the tug had been raised and repaired, the cost of raising her would surely have been covered by the collision clause.

Carver, Q.C., was not called on to reply.

A. L. SMITH L.J. The question in this case turns entirely on the true construction of the collision clause in the policy. That clause is limited to three subject-matters. It provides that, if the ship assured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof be found liable to pay and shall pay any sums, not exceeding the value of the ship assured, (1.) "in respect of injury to such other ship or vessel itself," or (2.) in respect of injury to goods and effects on board thereof, or

(1) [1894] P. 77. (2) [1898] A. C. 382.
(3) (1889) 14 App. Cas. 519.

(3.) for loss of freight then being earned by such other ship or vessel—then the underwriters will pay to the assured a certain proportion of the sums so paid by him. The question is, whether the sum now sued for is within the meaning of the policy a sum paid "in respect of injury to such other ship or vessel itself." It is contended for the plaintiff that he is entitled to recover upon the policy, not only the specified proportion of the sum paid by him in respect of the loss of the tug, which the defendants have paid, but also the like proportion of the sum which he had to pay to the owners of the tug in respect of the expenses of removing the wreck which they had paid to the Tees Commissioners. Pausing at the end of the words which describe the three subject-matters to which the collision clause applies, I should have said, with all deference to my brother Mathew J., that they were quite clear; and that the words "sums . . . . in respect of injury to such other ship or vessel itself" clearly would not include sums payable in respect of the expenses of removing the wreck which the commissioners were empowered by statute to recover from the tug-owners. Then comes the proviso, upon which so much stress was laid by the plaintiff's counsel, to the effect that the clause is not to be construed as extending to sums which the assured may become liable to pay in respect of loss of life or personal injury. It was argued that the insertion of that proviso, there being no similar proviso with regard to the statutory liability to repay the expenses incurred in removing wrecks, shews that the words describing the first subject-matter of the clause are wide enough to cover, and were intended to cover such expenses. I do not think that is so. It appears to me that the proviso was inserted ex majori cautelâ," and was not really necessary. I think the appeal must be allowed.

VAUGHAN WILLIAMS L.J. I agree. The question in this case depends on the meaning of the words "sums . . . . in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel." It seems to me

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Vaughan Williams L.J.

that those words, which enumerate the subject-matters against which the underwriters undertake by the collision clause to indemnify the assured, taken as they stand, are clear enough, and need no explanation. I think that primâ facie it is impossible to say that a sum of money which the assured has been compelled to pay in respect of the expenses of clearing the tideway of the Tees is a sum paid "in respect of injury to such other ship or vessel." We were invited, however, to put a different construction on those words, because of the proviso which follows them. If the words defining the subject-matters of insurance under the collision clause are clear, I do not think that we can extend or alter their effect by reason of the introduction of a proviso, which, when we look at it, appears to be one which a prudent underwriter might well think it desirable as a matter of caution to introduce into every policy containing a collision clause whatever its terms might be.

ROMER L.J. One thing I think is clear in reference to this clause, namely, that it was not intended thereby to make the insurers liable for every sum which the assured might have to pay in consequence of the ship insured coming into collision with another ship. It was plainly intended to limit the effect of the clause in some respects. On the true construction of its terms, I think that its operation was intended to be limited to three heads, namely, injury to the other vessel itself, injury to the goods and effects on board of her, and loss of freight then being earned by her, and that the sum claimed clearly does not come within any of those heads. I agree that the proviso with regard to loss of life and personal injury is really useless, and was merely added by way of superabundant caution. I do not think that the addition of such a proviso can alter the meaning of fairly plain words preceding it. The plaintiff's construction of the collision clause, if it were adopted, would give rise to difficulties as great as that which his counsel suggests with regard to the terms of the proviso. If the words "in respect of injury to such other ship or vessel" are to be read as equivalent to "in consequence of injury to such other ship or vessel," then what was the use of adding the words "or to the goods and effects

on board thereof"? As far as I can see, there could hardly be any injury to the goods and effects on board the vessel without some injury to the vessel itself. The same consideration applies to the words "or for loss of freight then being earned by such other ship or vessel." If the plaintiff's construction of the words "in respect of injury to such other ship or vessel itself" is adopted, the subsequent words appear to be useless. I think the words of the clause are on the whole reasonably clear, the only difficulty being caused by the proviso.

Appeal allowed.

Solicitors for plaintiff: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *W. A. Crump & Son.*

E. L.

ATTORNEY-GENERAL *v.* THE MIDLAND RAILWAY COMPANY.

1900
May 9.

Revenue—Stamp Duty—Railway Company—Increase of Nominal Capital—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

A special Act authorized the Midland Railway Company to rearrange and consolidate the several classes and denominations of the shares and stocks in the capital of the company, and of their loans and debenture stocks. Under the authority of that Act the following changes (inter alia) were effected by the company: 3,899,121*l.* 4 per cent. consolidated perpetual rent-charge stock was consolidated so as to amount to 6,238,594*l.* guaranteed stock bearing interest at the rate of 2*l.* 10*s.* per cent. per annum. 29,048,191*l.* 4 per cent. perpetual preference stock was extinguished, and in lieu thereof 46,477,106*l.* 2½ per cent. perpetual preference stock was created. Ordinary stock to the amount of 35,000,000*l.* was extinguished, and in lieu thereof there was created 35,000,000*l.* preferred converted ordinary stock, entitled to a dividend at the rate of 2*l.* 10*s.* per cent. per annum, and 35,000,000*l.* deferred converted ordinary stock:—

Held, that the increase authorized by the Act of the nominal amount of the share capital of the company was an "increase of the amount of nominal share capital" within the meaning of s. 113 of the Stamp Act, 1891, so that the stamp duty imposed by that section was payable in respect of it.

SPECIAL CASE, stated by consent pursuant to Order LXVIII., r. 2, and Order XXXIV., r. 1, on an information by the Attorney-

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General for penalties against the defendants under s. 113 of the Stamp Act, 1891. (1)

The defendant company was incorporated on May 10, 1844, by statute 7 & 8 Vict. c. xviii.

On August 6, 1897, the Midland Railway Act, 1897, was passed upon the petition of the defendant company. This Act recites (inter alia) that it is expedient "that provision should be made, as contained in this Act, for the rearrangement and consolidation of the several classes and denominations of the shares and stocks in the capital of the company, and of their loans and debenture stocks," and that the company should be empowered to raise additional capital for the purposes of the railways and other works by this Act authorized, and for other purposes of this Act, and for other purposes therein set forth.

By s. 59, "Subject to the provisions of this Act the company may consolidate the under-mentioned guaranteed and rent-charge stocks into one guaranteed stock of one class, and bearing interest at the uniform rate of two pounds ten shillings per centum per annum."

[Three classes of guaranteed and rent-charge stocks bearing

(1) 54 & 55 Vict. c. 39, s. 113: "(1.) Where by virtue of . . . . any Act the liability of the holders of shares in the capital of any corporation or company is limited otherwise than by registration with limited liability under the law in that behalf, a statement of the amount of nominal share capital of the corporation or company shall be delivered by the corporation or company to the Commissioners [of Inland Revenue] within one month after . . . . the passing of the Act; and in case of any increase of the amount of nominal share capital of any corporation or company, whether now existing or to be hereafter formed, being authorized by any . . . . Act, a statement of the amount of such increase shall be delivered by the corporation or company to the Commissioners within the like period.

"(2.) The statement shall be charged with an ad valorem stamp duty of two shillings for every one hundred pounds and any fraction of one hundred pounds over any multiple of one hundred pounds of the amount of such capital or increase of capital as the case may be, and shall be duly stamped accordingly when the same is delivered to the Commissioners.

"(3.) In the case of neglect to deliver such a statement as is hereby required to be delivered, the corporation or company shall be liable to pay to Her Majesty a sum equal to ten pounds per centum upon the amount of duty payable, and a like penalty for every month after the first month during which the neglect shall continue."

interest at 4 per cent. were then set forth]. . . . . "Upon the said consolidation taking effect every holder of existing stock shall be entitled to and shall receive in substitution for every one hundred pounds of such stock held by him such an amount of the new 2½ per centum perpetual guaranteed stock as will yield him an equivalent annual return to that which he now receives. . . . ."

Sect. 60: "On the first day of April, 1898, the then existing and authorized four per centum perpetual preference stock of the company shall be by virtue of this Act cancelled and extinguished, and on that day there shall be by virtue of this Act, without further or other authority, created in lieu thereof two and a half per centum perpetual preference stock of the company to an amount exceeding by sixty per centum the nominal amount of the stock so cancelled and extinguished:

"Every holder of the existing four per centum perpetual preference stock shall be entitled to and shall receive, in substitution for every one hundred pounds of such stock held by him, one hundred and sixty pounds of the new two and a half per centum perpetual preference stock, and so in proportion for every fraction of one hundred pounds."

Sect. 61: "On the first day of October, 1897, ... all the existing and authorized ordinary stock of the company shall be by virtue of this Act cancelled and extinguished, and on that day there shall be by virtue of this Act, without further or other authority, created ordinary stock of the company to the amount of seventy millions eight hundred and sixty-nine thousand eight hundred and ninety-four pounds and sixteen shillings in lieu of and in substitution for the stock cancelled and extinguished as aforesaid."

Sect. 62: "(1.) Of the new ordinary stock one-half . . . . shall be termed 'preferred converted ordinary stock,' and shall be entitled to an uniform dividend at the rate of two pounds ten shillings per centum per annum, which shall, subject to the provisions of this Act, be payable out of the profits of each half-year next after the dividend on any preference stock of the company. . . . .

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"(2.) The other half . . . . shall be termed 'deferred converted ordinary stock,' and shall be entitled to such half-yearly dividend as may be from time to time declared thereon by a general meeting after providing for payment of the dividends payable on any such preference stock as aforesaid, and on the preferred converted ordinary stock for the time being created and issued.

"(3.) Preferred converted ordinary stock and deferred converted ordinary stock shall respectively confer upon the holders thereof the same rights of voting at general meetings of the company as but for this Act would have been conferred by a like nominal amount of the existing ordinary capital of the company."

Sect. 63: "Every holder of the existing ordinary stock shall be entitled to and shall receive in substitution for every one hundred pounds held by him of that stock one hundred pounds preferred converted ordinary stock and one hundred pounds deferred converted ordinary stock, and so in proportion for every fraction of one hundred pounds."

Sect. 66: Any increase in the nominal amount of the preference to ordinary capital of the company by virtue of this Act shall not increase the amount which under any Act or Acts the company are authorized to borrow upon mortgage or by the creation and issue of debenture stock, and for the purpose of any such Act or Acts the amount of capital in respect of which the borrowing powers of the company may be exercised shall be taken to be the amount of which the capital of the company would have consisted if the ordinary stock had not been converted under this Act."

Sect. 67: "The company shall, notwithstanding the conversion under the powers of this Act of any ordinary stock, continue to ascertain and declare their dividends on the amount of ordinary stock which would have been entitled to dividend if no such conversion had taken place, and the dividend so declared shall for all purposes . . . . be held to be the dividend upon the ordinary stock of the company."

The following is a summary of the changes effected by ss. 59, 60, and 61 of the Midland Railway Act, 1897:—

By s. 59—

(*a*) 3,899,121*l.* 5*s.* four per cent. consolidated perpetual rent-charge stock was authorized to be consolidated so as to amount to 6,238,594*l.* guaranteed stock bearing interest at the rate of 2*l.* 10*s.* per cent. per annum—an increase of 2,339,472*l.* 15*s.*:

(*b*) 150,000*l.* Sheffield and Rotherham perpetual preferential stock was authorized to be consolidated so as to amount to 375,000*l.* guaranteed stock bearing interest at the rate of 2*l.* 10*s.* per cent. per annum—an increase of 225,000*l.*:

(*c*) 6,337,076*l.* 12*s.* 6*d.* four per cent. consolidated perpetual guaranteed preferential stock was authorized to be consolidated so as to amount to 10,139,322*l.* 12*s.* guaranteed stock bearing interest at the rate of 2*l.* 10*s.* per cent. per annum—an increase of 3,802,245*l.* 19*s.* 6*d.*

By s. 60, 29,048,191*l.* 15*s.* four per cent. perpetual preference stock (being the amount referred to by the section) was extinguished, and in lieu thereof 46,477,106*l.* 16*s.* two and a half per cent. perpetual preference stock was created—an increase of 17,428,915*l.* 1*s.*

By s. 61, ordinary stock (existing and authorized) to the amount of 35,434,947*l.* 8*s.* (being the amount referred to by the section) was extinguished, and in lieu thereof there was created 35,434,947*l.* 8*s.* preferred converted ordinary stock entitled to a dividend at the rate of 2*l.* 10*s.* per cent. per annum, and 35,434,947*l.* 8*s.* deferred converted ordinary stock—an increase of 35,434,947*l.* 8*s.*

The Commissioners of Inland Revenue claimed that duty was payable in respect of or upon (inter alia) the amount of the increases due to ss. 59, 60, and 61 of the Act of 1897, as being increases of "the amount of nominal share capital" within s. 113 of the Stamp Act, 1891. The defendants refused to deliver the statement under that section with reference to those increases, and contended that they were under no liability or duty to deliver such a statement.

On April 22, 1899, the Attorney-General filed an information claiming a sum which represented 10*l.* per cent. of the stamp duty of 2*s.* per cent. on the amount of the increase of nominal share capital authorized by the special Act of 1897 for every

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month after September 6, 1897, elapsed before the commencement of the suit. To this information the defendants pleaded the general issue.

The questions for the opinion of the Court, so far as material for the purposes of this report, were :—

(1.) Whether the increases in question ought to be included in a statement of the amount of increase to be delivered under the Stamp Act, 1891; and

(2) Whether the defendants were liable to pay the penalties, or any of them, claimed by the Crown.

Judgment to be for the Attorney-General if the Court should be of opinion that Her Majesty was entitled to recover any penalty, and for the amount of the penalties incurred before the commencement of the suit. Judgment to be for the defendants if the Court should be of opinion that Her Majesty was not entitled to recover any penalty.

Sir Richard Webster, A.-G. (*Danckwerts, Q.C.*, and *S. A. T. Rowlatt* with him), for the Crown. The operations effected by the defendants under ss. 59, 60, and 61 of the Midland Railway Act, 1897, constitute in each instance an "increase of the amount of nominal share capital" within the meaning of s. 113 of the Stamp Act, 1891. The defendants ought, therefore, to have delivered the statement required by that section. Taking what was done under s. 61 as an example, it is submitted that to convert ordinary stock to the amount of thirty-five millions into thirty-five millions preferred ordinary and thirty-five millions deferred ordinary stock is to increase the amount of nominal share capital by thirty-five millions, and the fact that there is no increase after the conversion in the dividends received by the shareholder does not make any difference. In *Attorney-General* v. *Milford Docks Co.* (1) the conversion by the company, under the authority of a special Act, of debenture stock into first preference stock was held to be an "increase of the amount of nominal share capital" within s. 17 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7). That section is repealed by the Stamp Act, 1891, but is re-enacted

(1) (1893) 69 L. T. 453.

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in s. 113. The Crown is entitled to judgment for the penalties claimed.

Sir Robert Reid, Q.C. (*Asquith, Q.C.*, and *Loehnis* with him), for the defendants. The increase intended by s. 113 of the Stamp Act, 1891, is a real increase of nominal share capital. There has been no real increase here—no new creation of share capital as there was in *Attorney-General* v. *Milford Docks Co.* (1), where share capital was created in lieu of debentures. There has been nothing more than a rearrangement of capital—not a bringing in of additional capital. The word "nominal" in s. 113 is an adjective applied to "share capital"—not to the word "amount." The words "any increase of the amount of nominal share capital" do not mean "any increase of the nominal amount of share capital," as they must mean if the contention for the Crown be well founded. The Midland Railway Act, 1897, by s. 57 authorizes the creation and issue of new stocks, and throughout the Act the distinction is clearly marked between an increase of capital by creating new stocks and a mere consolidation or rearrangement of existing stocks. Thus the preamble recites, first, that it is expedient that provision should be made for the "rearrangement and consolidation" of shares and stocks, and afterwards that it is expedient that the company should be empowered to raise additional capital. Sect. 59 enables existing stocks to be consolidated. Sects. 60 and 61 enable stocks to be substituted for then existing stocks. Sect. 62, sub-s. 3, provides that preferred converted ordinary stock and deferred ordinary stock shall respectively confer upon the holders thereof the same rights of voting at general meetings as would have been conferred by a "like nominal amount of the existing ordinary capital of the company." There the expression "nominal amount of capital" is used as signifying something different from "amount of nominal capital." So it is in s. 66, which provides that "any increase in the nominal amount of the preference to ordinary capital of the company" shall not increase the company's borrowing powers. It is submitted that s. 113 of the Stamp Act, 1891, only requires a statement

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to be delivered where the special Act authorizes additional capital to be brought in by the creation of new stock, and that the language of that section does not compel the Court to treat a mere rearrangement of capital as a real increase of capital for taxing purposes. The result would be to tax capital twice over.

Sir Richard Webster, A.-G., replied.

RIDLEY J. I think that our judgment should be for the Crown. The question turns upon a phrase in s. 113 of the Stamp Act, 1891. [The learned judge read s. 113.]

It is argued for the defendants that there has not been, in this case, any "increase of the amount of nominal share capital" within the meaning of that section. It is said that the phrase is intended to mean a real increase in the nominal share capital; that is to say, that not only in figures but in fact there should be more capital—more money advanced by way of capital, and more actually existing capital in money—than there was before. I do not think that the words of the statute require that interpretation. The "nominal share capital" means the capital in shares and the figure value attached to it. It seems to me that if the company extends the capital and gives it a greater nominal value, so that 100*l.* of capital becomes nominally 200*l.*, that is an increase in respect of which the Act requires that a statement should be delivered by the company. The Act does not say that only an actual and real increase of capital shall be the subject of the stamp duty, and I see no reason why we should limit the words of the Act in the way contended for. Certain sections of the Midland Railway Act, 1897, were relied on in order to shew the sense in which the words in the Stamp Act may have been intended to be used. The preamble of the private Act was referred to, which recites that "it is expedient that provision should be made as contained in this Act for the rearrangement and consolidation of the several classes and denominations of the shares and stocks in the capital of the company," and it was argued that the phrase "rearrangement and consolidation" was used by way of distinction between what has taken

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Ridley J.

place here and a real increase of capital. I cannot accept that view. I think the words "rearrangement and consolidation" are used as being the best general words to cover the operation intended to take place, which might result in an increase or might possibly result in a decrease. I think the words are simply words defining an operation which may result in the one or in the other. Again, it was argued that the words in s. 66 of the private Act, "any increase in the nominal amount of the preference or ordinary capital of the company," are used as distinguished from an increase in the nominal share capital, and that the expression "the nominal share capital" in the Stamp Act has a different signification. I cannot myself see the difference between "the nominal amount of share capital" and "the amount of nominal share capital." There is a different collocation of words, but I think the two expressions mean the same thing—that is to say, the quantity is to be judged by the amount. It is not enough to say that those expressions mean something different unless some reason is shewn for it. The fact is that by this change of the securities which represent the capital of the company there does come about an increase in the nominal share capital. Whether, when the Stamp Act, 1891, was passed, it was contemplated that this particular operation would be resorted to by railway companies it is impossible to say; it is enough for us to say that, primâ facie, unless some better reason be shewn to the contrary, this operation does come within s. 113 of the Stamp Act, 1891, and that, therefore, the company must be prepared to pay the stamp duty which is imposed in respect of the increase of their nominal share capital.

DARLING J. I am of the same opinion. The argument for the Midland Railway Company comes, it seems to me, to this —that whereas the statute says "in case of any increase of the amount of nominal share capital" stamp duty shall be paid, that provision must be read as if it was "in case of any *real* increase of the amount of nominal share capital," and we are asked to hold that what happened here was only a nominal increase in the amount of the share capital. It is said that

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Darling J.

there has been a nominal increase in the amount of share capital, and that is not within the statute because it is not an increase of the nominal share capital. But look at the facts. The nominal share capital stood, let us say, at 50,000*l*. This rearrangement, as it is called, took place, with the result that the nominal share capital stood at 75,000*l*. That cannot have happened without there having been an increase of the nominal share capital. The argument for the railway, it seems to me, treats the expression "nominal share capital" as though it were a convertible term with "assets." It is true that the assets of the company have not been increased. The amount which would be divisible among the shareholders if the concern were wound up has not been increased, but the nominal amount divisible among them has been increased, and that, I think, is the nominal share capital. It is perfectly well known in these days what the words "nominal share capital" mean. Companies are brought out day by day with a nominal share capital of many thousands of pounds when as a matter of fact there is no capital at all. I agree that the Crown is entitled to our judgment.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitors for defendants: *Beale & Co.*

W. A.

ARMITAGE, Appellant; MOORE, Respondent.

1900
May 9.

Revenue—Income Tax—Assignment for Benefit of Creditors—Profits made by Trustee in carrying on Part of Insolvent Debtor's Business—Income Tax Acts, Sched. D.

A firm of worsted spinners, having a lease for years of their business premises, generated steam power on part of those premises for the purpose of driving their spinning machines, and sub-let another part, and supplied their surplus steam power to the sub-lessees, and to others, at agreed prices. The firm subsequently became insolvent, and executed a deed of assignment of all their real and personal estate, other than leasehold property, to a trustee for the benefit of creditors. The trustee thereupon occupied the part of the premises which had been retained by the firm, and, under the powers of the deed of assignment, continued to supply the sub-lessees and the others with steam power upon the same terms for the purpose of realizing the firm's assets to the best advantage. He did not otherwise carry on the business of the firm. On the expiration of the sub-lease the firm, by the direction of the trustee, granted to the same underlessees a further underlease of the same part of the premises, and the trustee continued to supply the steam power on the same terms as before. The sums received by the trustee for the steam power supplied exceeded the cost of supplying it, though the whole business carried on by the firm had been carried on at a loss, and the assets realized by the trustee had only produced a dividend of 8*s.* in the pound:—

Held, that income tax under Sched. D was payable by the trustee in respect of the profits made by him in supplying the steam power.

Special Case stated by Commissioners of Income Tax.

At a meeting of the commissioners for general purposes under the Property and Income Tax Acts for the division of East Morley, in the county of York, held at Bradford, the appellant, W. H. Armitage, appealed against an assessment of 800*l.* made upon him under Sched. D for the year ending April 5, 1899, in default of a return, on estimated profits of supplying power at Caledonia Mills and Waterloo Mills, Bradford.

For some years prior to June 20, 1894, a firm of Craven & Craven carried on business in Bradford as worsted spinners, and they were the lessees, under a lease granted in May, 1892, by one Townsend, of the Waterloo Mills and also of the

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Caledonia Mills adjoining, for a term of years which will expire in July, 1902, at a rent of 2200*l.* per annum.

By an indenture of sub-lease, dated May 24, 1892, Craven & Craven demised to F. Illingworth, a wool-comber, for a term of seven years from July 1, 1892, the Caledonia Mills and part of the Waterloo Mills, together with steam, to be generated by Craven & Craven upon the Waterloo Mill and premises, and conveyed to an engine-house in Caledonia Mill and to an engine in Waterloo Mills, sufficient for warming the premises thereby demised, and for the supply of twenty horse power for electric lights in the demised premises, and also for the usual process of a wool-comber, and also steam power sufficient for driving the line-shaft, and fifty-one Noble's combing machines, and nine machines used for double combing, at certain rents therein specified in respect of each of the machines.

Craven & Craven continued in occupation of a portion of the remainder of the premises comprised in the lease from Townsend, and they sub-let to various tenants other portions, and supplied them with power for which Craven & Craven charged according to the number and kind of combing machines in use.

On June 20, 1894, Craven & Craven, having suspended payment and being insolvent, executed a deed of assignment for the benefit of their creditors, whereby they conveyed and assigned the whole of their real and personal estate, other than leasehold property or property of a leasehold tenure, to the appellant as trustee, with a committee of inspection, upon trust for realization and administration for the benefit of the creditors of Craven & Craven.

The trusts of the deed provide: "That the trustee shall sell the property and premises included in it, with power with the sanction of the committee to postpone the sale of all or any of the said premises, and in the meantime to manage the same in such manner as the committee shall think fit, and to call in and convert into money all the residue and remainder of the estate of the debtors, with power to the trustee with the consent of the committee to carry on the business of the debtors and any of such businesses for such time as the committee

direct." And by the same deed of assignment Craven & Craven covenanted and declared that they would stand possessed of all leasehold property of or to which they were then possessed or entitled either as part of the assets of the firm or for their own use and benefit upon trust for the trustee, and would assign and dispose of the same in such manner as the trustee should direct for the purposes of those presents, and that the net proceeds of every such disposition and the interim income of the said property should be paid to the trustee. And the deed provides further that the trustee shall stand possessed of the moneys to arise from such sales, calling in, and conversion as aforesaid upon trust, after payment of (amongst others) the expenses of carrying out the trusts of the deed, in effect to distribute the same among the creditors as in bankruptcy.

The appellant, for the purpose of winding up Craven & Craven's business as spinners, continued to occupy the portion of the premises comprised in the lease from Townsend which they had occupied, and the appellant continued to supply power to Illingworth in accordance with the sub-lease to him, and also to the various other tenants of Craven & Craven.

The appellant, as trustee under the deed of assignment, has realized the assets of Craven & Craven except the lease from Townsend, and has paid dividends to creditors under the deed, amounting in all to 8*s.* 6*d.* in the pound, on admitted claims amounting to 197,492*l.*

Except as herein mentioned and for the purpose of winding up the estate, the appellant, as trustee, has not carried on any of the businesses of the debtors, but has realized the debtors' estate as speedily as, under the directions of the committee, appeared advantageous to the creditors.

By the directions of the appellant Craven & Craven granted to Illingworth a further lease, dated October 12, 1897, for a term of three years from July 1, 1899, of the mills and steam and motive power comprised in the lease of May 24, 1892, and the further lease contained provisions similar to those contained in the lease to Illingworth of May 24, 1892.

The appellant still holds a portion of the remainder of the premises comprised in the lease from Townsend, and he

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supplies the power to Illingworth according to the terms of the underlease, and to the various other tenants.

The portion of the premises in the occupation of Illingworth and the other sub-tenants is assessed to income tax under Sched. A at the gross estimated rental of 240*l.*—net 200*l.* 10*s.*

The cost to the appellant of supplying the power to the various parties consists of the rent of the premises paid by him to Townsend, the cost of coal, water, and oil for the engine and shafting, the wages of the engine-tenter and other necessary men, and other costs and charges.

The total amount received by the appellant from Illingworth and the other tenants in respect of the power is considerably in excess of the total amount of the above-mentioned items of cost. The general commissioners have assessed the appellant at the sum of 800*l.* under Sched. D in respect of profits of power.

The amount of the assessment is not questioned; but the appellant contends that the difference between the cost of supplying the power and the payment he receives for it is not a profit in respect of which he is liable under the Income Tax Acts.

The general commissioners were of opinion that the said difference is profit assessable under Sched. D, and that it is immaterial how such profit is applied by the appellant, and they decided that the assessment on the appellant should be confirmed.

The question for the opinion of the Court is, whether the appellant is liable to be assessed in respect of the said sum of 800*l.* as profit derived from supplying power as set out in the case.

Lawson Walton, Q.C. (*Muir Mackenzie* with him), for the appellant. The income tax under Sched. D is not payable in respect of the profit made by supplying the steam power. The appellant at the most is only carrying on one part of the whole business, and he is doing so as agent and manager for Craven & Craven, whose business as a whole has resulted in a loss.

If Craven & Craven had been adjudicated bankrupts, income tax might then be payable, because there would then be a cessio bonorum.

Sir Richard Webster, A.-G. (*Danckwerts, Q.C.*, and *S. A. T Rowlatt* with him), for the respondent. The statements in the case shew that the appellant carried on the business of supplying steam power to various persons and made profits thereby. He is therefore liable to income tax in respect of those profits under Sched. D. It makes no difference that the profits ultimately go to somebody else: *Mersey Docks* v. *Lucas*. (1)

Muir Mackenzie, in reply. The appellant was not carrying on a trade or business in respect of which he was liable to assessment under Sched. D. He was simply administering the trusts of the deed of assignment by realizing the assets of an insolvent estate for the benefit of the creditors. The underlease to Illingworth of October 12, 1897, was only a method of realizing this asset to the best advantage. An executor, where the testator's estate is insolvent, does not carry on the testator's business by realizing his assets.

Sir Richard Webster, A.-G., replied.

RIDLEY J. We are both of opinion that the decision of the Income Tax Commissioners should be affirmed. It was argued for the appellant that, because the trade or business in question —for it was a trade or business—was carried on in order that the trustees might increase the dividend already received by the creditors and for their benefit, it was not, therefore, a carrying on of the trade at all, but was simply realizing the assets for the benefit of the creditors according to the best method which could be devised. I cannot agree with that argument. It may be that it was the best method the trustee could devise for the benefit of the creditors, but none the less was it a trade or business which he was carrying on. It might as well be said, whenever a person carries on a business with the view of paying over out of the profits a debt which he owes to somebody else, that he is not carrying on a trade or business,

(1) (1883) 8 App. Cas. 891.

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ARMITAGE v. MOORE.

Ridley J.

but is endeavouring to realize for somebody else a sum of money which he owes him. I do not follow the argument. The matter would be different if the rest of the debtors' business, which was previously carried on at a loss, were still being carried on. Then, under s. 23 of the Customs and Inland Revenue Act, 1890, the appellant could have appeared before the commissioners and required that his liability should be adjusted according to the terms of that section. But here the debtors' other business is not being carried on; it has come to an end, and the only argument raised is that because there still remains a liability to their creditors what remains to be carried on as business is no longer a business at all. But it is. I fail to see why such a business is not within Sched. D, and I therefore think that the appellant is liable to income tax.

DARLING J. I am of the same opinion. Messrs. Craven & Craven carried on business as worsted spinners, and part of the business was that, as they generated a great deal more power than they wanted for their own business, they supplied power at a profit to other persons carrying on similar businesses. I take it, therefore, that their business was that of spinning worsted for themselves and supplying power to others. They failed in business, and an arrangement was come to by which the appellant was empowered by the creditors to take the business as trustee for them, and this case states that he had power, as trustee, to carry on the debtors' business. It is further stated that the appellant, as trustee under the deed of assignment, has realized Messrs. Craven's assets, except the lease under which this power is supplied, and has paid dividends to the creditors. What he did under the powers given to him was this: he set to work to carry on the business, but he stopped carrying on all that part of the business which consisted of the spinning of worsted on the premises, and he distributed such assets as he was able to get into his hands when he gave up that business. He got power to make, and made, a further lease, which resulted in the letting out of the power generated on the premises in his possession to people for more than it cost. He is now, therefore, carrying on at a

profit so much of Messrs. Craven's business as consisted of the generating of power and supplying it to other people who wanted it. If he had carried on the whole of Messrs. Craven's business at a profit, I think he would have had to pay income tax. If he carries on a portion of it at a profit I think he must pay income tax, although for his own purposes he has abandoned the carrying on of those portions of it which resulted in a loss. He now says that the income which he earns is not taxable as income earned in the business, because when he has got his profit he is, as trustee, going to apply it in liquidating losses which were made in another part of the business. Those losses are not being made now; they are debts which he is going to pay, and it seems to me that a man who makes a profit in a particular year cannot be heard to say, "I am not making a profit this year, because when I have got the money which is called a profit I am going to pay debts incurred years ago." The contention for the appellant here seems to me precisely like that contention, and I agree that there should be judgment for the Crown.

Judgment for the Crown.

Solicitors for appellant: *Field, Roscoe & Co., for Taylor, Jeffery & Jessop, Bradford.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

W. A.

C. A.
1900
June 15, 28.

[IN THE COURT OF APPEAL.]

ELLIOTT *v.* YATES AND ANOTHER.

Revenue—Collection of Taxes—Income Tax and Inhabited House Duty—Distress — Powers of Collectors — Expiration of Collector's Year — Taxes Management Act, 1880 (43 & 44 *Vict. c.* 19).

The collectors appointed in each year under the Taxes Management Act, 1880, to collect the duties payable for the year have authority to distrain for those duties if unpaid, although the year has expired; at any rate until they have accounted for the duties given them in charge to collect under Part VII. of the Act.

APPLICATION by the plaintiff for judgment or a new trial in an action tried before Channell J. with a jury.

The action was for trespass by entering the plaintiff's dwelling-house and illegally distraining his goods.

The defendants were collectors of income tax under Scheds. A and B and of inhabited house duty for the year ending April 5, 1899, and by a warrant signed by the Commissioners of Income Tax and Inhabited House Duty, on December 13, 1898, in the form No. 5 given by the Taxes Management Act, 1880, Sched. II., were authorized to demand and collect the duties payable for the year and distrain for them if unpaid. On May 25, 1899, they caused a distress to be put into the plaintiff's house for income tax and inhabited house duty due from him for the year ending April 5, 1899. No day of receipt for that year had previously been appointed under s. 100 of the Taxes Management Act, 1880.

The plaintiff subsequently paid the amount due, and the distress was then withdrawn.

It was contended for the plaintiff that the defendants' powers and authority to collect and distrain for unpaid income tax and house duty determined on April 5, 1899, and therefore the distress was illegal.

Channell J. held the contrary, but directed the jury to assess damages provisionally, which they did. The plaintiff now

moved to enter judgment for himself for the damages so assessed, or for a new trial.

Witt, Q.C., and *Poley*, for the plaintiff. The collectors under the Taxes Management Act, 1880, are appointed for the year ending April 5, and their warrant to distrain must be construed as limited to their year of office. It is submitted that on the true construction of the Taxes Management Act, 1880, the office of collector is a yearly office, and its powers are limited to the year of office. Part VII. of the Act deals with the collection of duties unpaid at the end of the year. By s. 100 a day of receipt is to be appointed by the Commissioners of Inland Revenue in each year, and on that day the collector is to render his account, and deliver a schedule of arrears, setting out the names of those who have made default in payment of duties and the amounts in arrear. Sect. 105 and following sections shew how those arrears are to be dealt with. It is clear that in respect of such arrears the collector cannot distrain under his former warrant except by direction of the Commissioners. It appears to be contemplated by the Act that, after the expiration of the year of office, arrears shall be recovered by the machinery given in Part VII. In the event of that machinery failing, recourse may be had to the alternative remedy given by s. 111, namely, suing the defaulter as a Crown debtor.

[They also referred to Taxes Management Act, 1880, s. 73, sub-ss. 1, 9, 10; ss. 79, 85, 86, 103, 104, 107, 108, 117.]

Bowen Rowlands, Q.C., and *E. Layman*, for the defendants. The appointment of the collectors under the Act is to collect the duties payable for the particular year, but the office is not a yearly office. The collectors' warrant authorizes them to collect the duties for the particular year, but there is nothing to limit its operation to the period of that year. What might be the effect, if a day of receipt had been appointed under s. 100, it is not necessary to consider, for no such day had been appointed when the distress took place. There is nothing in the Act itself to limit the duration of the powers of the collectors to the particular year; their powers only relate to the

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duties payable for that year, but under the circumstances of the present case there is nothing in the statute to prevent their being exercised with regard to those duties after the expiration of the year. The collectors for one year are not appointed in the place of the collectors for the previous year.

Witt, Q.C., in reply.

Cur. adv. vult.

June 28. A. L. SMITH L.J. read the following judgment:— The plaintiff in this action seeks to recover from the defendants damages for having trespassed upon his dwelling-house at Maidenhead on May 25, 1899. The defendants were collectors of income tax under Scheds. A and B of the Income Tax Acts, and also of inhabited house duties, and were appointed by the Commissioners of Taxes to collect the same pursuant to the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), for the year ending April 5, 1899.

The defendants justify the alleged trespass under a warrant dated December 13, 1898, duly granted to them under the Taxes Management Act, 1880.

It is not in dispute—(1.) that the taxes for which the defendants distrained had been duly demanded of the plaintiff upon January 1, 1899; (2.) that those taxes then became due and payable by the plaintiff, and continued so down to the distress (which is the alleged trespass) upon May 25, 1899; and (3.) that the plaintiff throughout persisted in refusing to pay what was due from him, and that he had no valid excuse for such refusal.

The first point taken on behalf of the plaintiff is that under the warrant the defendants' authority to distrain came to an end upon April 5, 1899, and consequently they were functi officio upon May 25, 1899, and could not justify under it. In my judgment this is not so, and the authority under the warrant has no such limitation, and this will be seen on reading it. The warrant, after reciting the appointment of the defendants to be collectors of the duties arising from property, professions, trades, and offices, and of the duties on inhabited houses for the year ending April 5, 1899, enjoins and requires the collectors

to make demand of the several sums from the parties charged therewith, and upon payment thereof to give acquittance, and, "if any person or persons shall refuse to pay the sum or sums charged upon him, her, or them, upon demand duly made . . . . for non-payment thereof to distrain for the same according to the directions of the said Acts by virtue of this our warrant, without further authority." I do not find in this warrant that the power to distrain is limited to a distress made on or before April 5, 1899, but, on the contrary, the power given is to distrain without limit as to time for duties payable "for the year ending April 5, 1899." I would point out that the collectors appointed in the succeeding year, "for the year ending April 5, 1900," could not distrain for the taxes and duties due for the preceding year ending April 5, 1899.

So much for the warrant itself under which the defendants justify; but it is further argued for the plaintiff that by the Taxes Management Act, 1880, the collectors became functi officio upon April 5, 1899. I will first deal with the only section that has any possible bearing upon this point prior to s. 100, for in that and the following sections the statute deals with a new state of circumstances which does not apply to the present case. Sect. 73, which is the only section referred to in this part of the Act, deals with the nomination of collectors in the month of April in each year. There is nothing in this section which enacts that after the month of April, 1899, the nominated collectors may not get in unpaid arrears which they were appointed to collect, and which they could not collect owing to the persistent refusal of the taxpayer to pay; and, indeed, sub-s. 9 of the section points to this, namely, that it is not until the collector's accounts for the year have been closed that the collector's office is at an end. I can find down to s. 100 nothing which enacts that a collector's power to distrain under s. 86 of the Act ceases upon April 5 in any year under a warrant similar to that in the present case. The collector's appointment is not for one year only and no more; his appointment is to collect the taxes for the year ending April 5. Although there is a fresh appointment every year, the collectors appointed are not in the place of those appointed in the

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A. L. Smith L.J.

preceding year, but to collect another year's taxes. No doubt as a rule the duties of the collectors for a particular year would be practically ended with the year, but they are not appointed only for the period of a year, nor do their duties of necessity end with the year. As a short method of description they might be referred to as collectors appointed for a year, and I think that the expression in s. 117, sub-s. 1, "for the remainder of the year" is explicable on the view that the Act intended to shew clearly that the appointment of one collector in lieu of another was not intended to invalidate the latter's acts for the period during which he had acted.

At s. 100 there comes a new part of the Act, namely, Part VII., headed "Receipt and Account." This gives rise to other considerations. By s. 100 the Board may appoint in each year a day to receive the moneys received by the collectors, on which day the collectors shall account for all moneys given them in charge to collect. By s. 103, on the appointed day the collectors are to pay over to the Collector of Inland Revenue the moneys received by them, and by (*b*) to deliver a schedule of arrears. Until this is done, in my judgment, the collectors' authority to collect has not terminated. By s. 105 and post under the heading of "Schedules of Arrears" different processes are prescribed by which a defaulting taxpayer may be brought to book by the Commissioners and others. In the present case no day prior to the day of distress had been appointed for receipt of the moneys collected by the collectors under s. 100, and consequently no schedule of arrears was in existence; and it will be seen that in this state of circumstances none of the sections after and including s. 100 have any application to this case, and I have not to consider what effect they would have if they did apply. I cannot find in the Act prior to s. 100, which is the part of the Act which applies to this case, any more than in the warrant itself, that the authority of the collector to collect arrears due before April 5, 1899, terminates upon that day, and, as no day for receipt has been appointed under s. 100, the sections subsequent thereto do not apply.

The argument that the proceedings to make the plaintiff pay

after April 5, 1899, must be by way of making him a Crown debtor is not well founded in this case, and in my opinion in the present case there is nothing to justify such an argument.

The above are the only points now remaining in the case. I agree with my brother Channell that the defendants can justify, as they have done, under their warrant of distress of December 13, 1898. The appeal must therefore be dismissed.

VAUGHAN WILLIAMS L.J. I agree. No doubt there is a fresh nomination of collectors in each year; and no doubt the statute contemplates the rendering of accounts by the collectors and the collection of arrears and closing of the accounts in each year, and, when once the account has been closed, it appears that the collectors would have no power to distrain without a special authorization from the Commissioners; but notwithstanding all this the fact remains that neither in the statute nor in the warrant given to the collectors is there any limitation of the power to distrain to one year.

ROMER L.J. I have had an opportunity of reading my Lord's judgment, and I agree with it.

Application dismissed.

Solicitors for plaintiff: *Samuel Price & Sons.*

Solicitor for defendants: *F. FitzPayne, for C. R. Thomas, Maidenhead.*

E. L.

C. A.
1900
June 19.

[IN THE COURT OF APPEAL.]

LADIES' DRESS ASSOCIATION, LIMITED *v.* PULBROOK.

Company—Calls on Forfeited Shares—Liquidation—Past Member of Company—Reduction of Capital—Special Resolution—Irregularity—Certificate of Registration—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 38, 51—*Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *ss.* 9, 11, 15, 16.

The articles of association of a company provided that any member whose shares had been forfeited should, nevertheless, be liable to pay all calls owing upon the shares at the time of the forfeiture. The defendant had been the owner of shares in the company, but his shares had been forfeited for non-payment of calls. More than a year after the forfeiture the company went into liquidation, and the defendant was then sued for the unpaid calls :—

Held, that, notwithstanding the provisions of s. 38 of the Companies Act, 1862, sub-ss. 1, 3, the action was maintainable, inasmuch as the defendant was liable, not as a contributory, but as a debtor to the company.

Where the resolution confirming a resolution by a company to reduce its capital did not comply with the terms of s. 51 of the Companies Act, 1862, because there was not an interval of fourteen days between the passing of the two resolutions, but an order of the Court had been made in accordance with the resolutions under s. 11 of the Companies Act, 1867, and the Registrar of Joint Stock Companies had certified the registration of the order, together with a minute approved by the Court, in conformity with s. 15 of that Act :—

Held, that the certificate of the registrar was conclusive evidence that a special resolution to reduce the capital of the company had been duly passed in accordance with s. 51 of the Companies Act, 1862, and s. 9 of the Companies Act, 1867.

APPEAL from the judgment of Ridley J. in an action tried by him without a jury.

The action was to recover calls on shares. The defendant became in 1883 the owner of thirty-seven 5*l.* preference shares and nine 5*l.* ordinary shares in the plaintiff company. On the preference shares 3*l.* had been paid, and on the ordinary shares 2*l.* The articles of association did not contain any power to reduce the capital of the company, but art. 9 empowered the

company from time to time by resolution of a general meeting to subdivide its shares or any of them into shares of a less amount than was fixed by the memorandum of association. The articles empowered the company to forfeit the shares of members of the company who made default in paying calls, and it was provided by art. 140 that any member whose shares should have been so forfeited should nevertheless be liable to pay to the company all calls, defaults, and instalments owing upon the shares at the time of the forfeiture together with interest at a rate specified. By resolution of an extraordinary general meeting of the company held on June 3, 1886, it was resolved to add to art. 9 the words: "The company may also from time to time reduce the capital, and may cancel any shares that have not been taken or agreed to be taken." This resolution was confirmed at an extraordinary general meeting held on June 17 following. At the same meeting it was resolved to reduce the capital of the company from 100,000*l.* to 63,000*l.*, cancelling paid-up capital and reducing the nominal amount of the shares, both preference and ordinary, from 5*l.* to 3*l.* 3*s.*; and it was further resolved to divide each of the issued shares into three shares of 1*l.* 1*s.* each. This resolution was confirmed at an extraordinary general meeting held July 1, 1886. On July 24, 1886, an order of the Court was made under s. 11 of the Companies Act, 1867, in accordance with the above-mentioned resolutions, by which it was ordered: (1.) that the capital of the company should be reduced from 100,000*l.* to 63,000*l.* in manner following: (*a*) by cancelling paid-up capital, which had been lost and was unrepresented by available assets, to the extent of 37*s.* on each of the 6859 preference shares and on each of the 2977 ordinary shares which had been issued, and accordingly reducing the nominal amount of each of the said preference shares and ordinary shares to 3*l.* 3*s.*; (*b*) by reducing the nominal amount of each of the unissued preference shares and ordinary shares from 5*l.* to 3*l.* 3*s.*: (2.) that each of the 6859 issued preference shares and 2977 issued ordinary shares should be divided into three shares of 21*s.* each . . . . And it was ordered that a copy of the order should be produced to the Registrar of Joint Stock

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Companies, and that an office copy of the order, together with a minute in the words or to the effect set forth in the schedule to the order, should be delivered to him. The schedule to the order was as follows: "The capital of the company is 63,000*l.*, divided into 20,577 preference shares of 1*l.* 1*s.* each, on which the sum of 7*s.* 8*d.* per share is to be deemed to have been paid up, and 3141 preference shares of 3*l.* 3*s.* each (which have not been issued, or have been forfeited and not reissued), on which no sum per share is to be deemed to have been paid up, and of 8931 ordinary shares of 1*l.* 1*s.*, on which the sum of 1*s.* per share is to be deemed to have been paid up, and 7023 ordinary shares of 3*l.* 3*s.* each (which have not been issued, or have been forfeited and not reissued), on which no sum per share is to be deemed to have been paid." This order of the Court was duly registered on August 24, 1886, by the Assistant Registrar of Joint Stock Companies, and such registration was duly certified by him in accordance with s. 15 of the Companies Act, 1867. The effect of the order of the Court upon the defendant's holding was that he became the holder of 111 preference shares of 1*l.* 1*s.* each, nominal value, on each of which 7*s.* 8*d.* had been paid up, and of twenty-seven ordinary shares of 1*l.* 1*s.* each, on which 1*s.* had been paid up. On November 15, 1894, it was resolved to call up the balance of uncalled capital, and the calls for which the action was brought were made in pursuance of that resolution. On October 24, 1895, the defendant's shares became forfeited for non-payment of those calls. On November 25, 1896, a resolution for winding up the company was passed, and the company went into liquidation. The action was subsequently brought to recover the unpaid calls from the defendant. Ridley J. gave judgment for the plaintiffs.

Bramwell Davis, Q.C., *T. Terrell*, Q.C., and *W. Coldridge* with him, for the defendant. The defendant ceased to be a member of the company more than a year before the commencement of the winding-up. It is submitted that the effect of s. 38 of the Companies Act, 1862, is that he cannot by any means be made liable to contribute the amount of these calls

to the assets of the company; in any case as a past member he could not be made so liable in the absence of evidence that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act. It is submitted that, that being so, this action cannot be maintained. The meaning of the section is that past members of the company shall not be made liable to contribute to the assets of the company except as mentioned in the section. [He cited on this point *Needham's Case* (1); *Stocken's Case* (2); *Creyke's Case* (3); *In re Accidental and Marine Insurance Corporation* (4); *Webb* v. *Whiffin*. (5)]

Secondly, the resolution confirming the resolution to alter the articles of association by giving power to reduce the capital of the company was invalid, because an interval of fourteen days had not elapsed since the passing of the original resolution, as required by s. 51 of the Companies Act, 1862. The same objection applies to the resolution to reduce the capital of the company and subdivide the shares. Consequently, there was no special resolution to reduce the capital of the company within the meaning of s. 51 of the Companies Act, 1862, and s. 9 of the Companies Act, 1867, and the shares on which the calls were made had no legal existence. This is not a mere irregularity which would come within the terms of s. 15 of the Companies Act, 1867. That section provides that there shall be delivered to the Registrar of Joint Stock Companies a copy of the order of the Court confirming the reduction of the capital, and a minute (approved by the Court) shewing with respect to the capital as altered by the order the amount of such capital, the number of shares into which it is to be divided, and the amount of each share, and that he shall register the order and minute, and the certificate of registration by the registrar shall be conclusive that all the requisitions of the Act with respect to the reduction of capital have been complied with, and that the capital of the company is such as is stated in the minute.

(1) (1867) L. R. 4 Eq. 135.
(2) (1868) L. R. 3 Ch. 412.
(3) (1869) L. R. 5 Ch. 63.
(4) (1870) L. R. 5 Ch. 428.
(5) (1872) L. R. 5 H. L. 711.

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That section would cover incidental irregularities such as defects in the notices convening meetings and such like, but could not have been intended to apply to the absence of a valid special resolution upon the existence of which the validity of the reduction of capital is based. The passing of valid resolutions confirming the original resolutions to alter the articles and to reduce the capital is an essential condition precedent to the alteration of the constitution of the company and the legal existence of the new shares. The calls are, therefore, null and void. The case is similar in principle to that of *In re National Debenture and Assets Corporation* (1), in which it was held that the signature of the memorandum of association by seven persons is a condition precedent to the incorporation of a company, and, where it was in fact only signed by six persons, the certificate of incorporation was not conclusive. [He also cited on this point *In re Laxon & Co.* (2); *Rosenberg* v. *Northumberland Building Society.* (3)]

Carver, Q.C. (*Bartley Dennis* with him), for the plaintiffs, referred to s. 16 of the Companies Act, 1867, which provides that the minute referred to in s. 15, when registered, shall be deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be of the same validity and subject to the same alterations as if it had been originally contained in the memorandum of association. [He was not called on to argue.]

VAUGHAN WILLIAMS L.J. I do not think that there is anything in either of the points taken by the counsel for the defendant. He relies on the suggestion that, inasmuch as the defendant's shares were forfeited more than a year before the commencement of the liquidation, the defendant was not liable, having regard to the terms of s. 38 of the Companies Act, 1862, to be placed on either the A or B list of contributories. He may be right in this, but it seems to me quite

(1) [1891] 2 Ch. 505. (2) [1892] 3 Ch. 555.
(3) (1889) 22 Q. B. D. 373.

immaterial whether he is so or not. The articles of association provide that, notwithstanding the forfeiture of shares, there shall remain a liability for calls accrued due before the forfeiture. It is not material, as it appears to me, to consider whether, technically speaking, that provision imports a continuance of the old liability or the creation of a new one. The effect of it was that there was a right of action for these calls vested in the company at the time when it went into liquidation, and there can, in my opinion, be no doubt that that right of action continued to exist afterwards. The point taken by the defendant's counsel appears to me to afford no answer to the action.

With regard to the other point taken, ss. 15 and 16 of the Companies Act, 1867, clearly shew that the certificate of the registrar is conclusive, and, if there was any irregularity with regard to the passing of the resolution confirming the resolution to reduce the capital of the company, we have no power to inquire into it. For these reasons I think that the appeal should be dismissed.

ROMER L.J. I agree. There is in my opinion no substance whatever in either of the points taken. With regard to the first point it is clear that a person in the position of the defendant is liable with regard to unpaid calls, not as a contributory, either as a present or a past member of the company, but as a debtor to the company under the provisions of the articles of association. This was pointed out as long ago as 1867 by Romilly M.R. in *Needham's Case.* (1)

With regard to the second point all I can say is that, if s. 15 of the Companies Act, 1867, is to have any effect at all, I think it must be applicable to such a case as the present. The case of *In re National Debenture and Assets Corporation* (2) appears to me clearly distinguishable from the case now before us. If it were not so, it might be necessary for us to consider whether certain observations made by the Court in that case, which were only dicta, could be justified. But, as that case seems to

(1) L. R. 4 Eq. 135.

(2) [1891] 2 Ch. 505.

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me wholly different from the present, I do not think it is necessary to discuss it.

A. L. SMITH L.J. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Simpson, Cullingford, Partington & Holland.*

Solicitor for defendant: *G. T. B. S. Thurnell.*

E. L.

1900 *May* 22.

HAWKINS *v.* JUSTICES OF BRIDGWATER.

Licensing Acts—Licence—Renewal—Objection—Request for Adjournment—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42.

At the general annual licensing meeting for a borough, a request was made by the head constable that the renewal of the licence of a beerhouse which had been licensed prior to May, 1869, should be withheld until the adjourned meeting, and the justices accordingly adjourned the granting of the renewal:—

Held, that this request amounted to the making of an objection within the meaning of the proviso to s. 42, sub-s. 2, of the Licensing Act, 1872, and gave the justices jurisdiction to refuse the renewal at the adjourned meeting on one of the four grounds specified in s. 8 of 32 & 33 Vict. c. 27.

CASE stated by quarter sessions for the county of Somerset.

The appellant was the tenant of a licensed beerhouse situate in St. Mary Street, in the borough of Bridgwater, and known as the Mariner's Compass. The house had been licensed as a beerhouse prior to May 1, 1869, for consumption of beer on the premises. On August 29, 1899, the general annual licensing meeting for the borough of Bridgwater was held. Prior to that meeting no notice of objection to the renewal of the licence of the Mariner's Compass had been served on the appellant, and he did not attend the meeting, nor was he required to do so.

At the meeting the head constable for the borough of Bridgwater presented his report (which was read in open court by the clerk to the justices) as to offences, &c., committed by licensed victuallers and in and about licensed premises

during the year. The report contained the following clause: "It is my pleasure to again report a decrease in the charges of drunkenness during the year, and also that the licensed houses generally have been well conducted, but I respectfully ask that the renewal of the Mariner's Compass Beerhouse, St. Mary Street, may be withheld until the adjourned meeting." No objection to the renewal was in fact then made, and no ground of objection then stated. The justices thereupon directed the matter to stand over till September 25.

On September 7 a summons was issued against the appellant under s. 14 of the Licensing Act, 1872, for permitting his licensed premises to be the resort of reputed prostitutes on August 27, 1899 (two days before the general annual licensing meeting). The fact that the justices had directed the matter to stand over was personally brought to the knowledge of the appellant by the head constable a day or two after August 29, and he was at the same time told the charges that would be preferred against him.

On September 18 the summons came on for hearing, and the appellant was convicted and fined, and the conviction was ordered to be indorsed on the licence. Application was made by the owner of the house for a temporary transfer of the licence to another tenant, but on the objection of the head constable the application was refused.

On September 21 the clerk to the licensing justices gave the appellant notice of the adjourned meeting, and required him to attend in person to apply for the renewal of his certificate.

The adjourned meeting was held on September 25, and the appellant attended and applied for the renewal. The head constable objected to the renewal. The appellant, by his solicitor, contended that the justices had no jurisdiction to entertain the objection, on the grounds that no notice in writing of the objection to the renewal, or of the intention to oppose the renewal, had been served on the appellant as required by s. 42 of the Licensing Act, 1872; that no notice in writing of the grounds of objection had been served upon him as required by s. 26 of the Licensing Act, 1874, and s. 42 of the Licensing Act, 1872; and that no objection to the renewal of the licence

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was made at the general annual licensing meeting on August 29, as mentioned in the proviso to sub-s. 2 of s. 42 of the Licensing Act, 1872. The justices overruled these objections, and, as the appellant declined to call evidence, they, after hearing the evidence of the head constable as to the conviction, refused to renew the licence on the ground that the appellant had failed to produce evidence of good character (being one of the four grounds specified by s. 8 of the Wine and Beerhouse Act, 1869). The appellant appealed to quarter sessions; but that Court upheld the decision of the licensing justices, and stated this case for the opinion of the Court. (1)

Foote, Q.C. (*F. E. Weatherly* with him), for the appellant. The justices had no jurisdiction in the matter. No objection to the renewal of the licence was made. The head constable merely asked for an adjournment, and that does not amount to the making of an objection within the meaning of the Act.

Duke, Q.C. (*Douglas Metcalfe* with him), for the respondents. The request of the chief constable for an adjournment was equivalent to making an objection, and it was so treated both by him and by the licensing justices. It is quite immaterial how the objection originates.

Foote, Q.C., replied.

RIDLEY J. In this case the question that we have to decide is whether an objection has been made to the renewal of the

(1) By s. 42 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), "Where a licensed person applies for the renewal of his licence, the following provisions shall have effect:—

"(1.) He need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend.

"(2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered as if the notice hereinbefore prescribed had been given. . . ."

licence in question within the terms of s. 42, sub-s. 2, of the Licensing Act of 1872. I confess that I have entertained some doubt on the question, but I have come to the conclusion that an objection was made.

Sect. 42 by sub-s. 1 says that where a licensed person is applying for the renewal of his licence he need not attend in person at the general annual licensing meeting unless he is required by the licensing justices to attend. Then sub-s. 2 is in the following terms: "The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered as if the notice hereinbefore prescribed had been given."

It is not the case that the licensing justices had no power to adjourn the application for a renewal. They had a general power of adjournment at their discretion. But the meaning of the proviso to this sub-section seems to be that, if an objection to the renewal of any licence is made in court by any one, the application for the renewal of that licence may be adjourned, and the holder of the licence may be required to attend at the adjourned hearing.

Now, in this particular case no formal written notice of an intention to oppose the renewal of the licence in question had been given before the general annual licensing meeting, and the holder of the licence had not been required to attend it. When the meeting was held, however, the report of the head constable was read, and it contained the following passage: "I respectfully ask that the renewal of the Mariner's Compass Beerhouse, St. Mary Street, may be withheld until the adjourned meeting."

The report, therefore, is not an objection in the sense that the head constable expressly said that he was an objector, and

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that he therefore asked the justices to adjourn the application, but he asked that the renewal might be withheld until the adjourned meeting.

The licensing justices treated this as if it were an objection taken there and then by the head constable to the renewal of the licence, and they adjourned the application for the renewal to a future day, and required the attendance of the holder of the licence on that day. It is clear, therefore, that the request of the head constable was regarded both by himself and by the justices as being equivalent to his making an objection to the renewal of the particular licence. I think that, although the word object or objection was not used, the head constable did in fact at the general annual licensing meeting make an objection to the granting of this renewal, and that his motive was that he wished to prevent the renewal from being granted at that time in order that he might consider what course he should adopt in the future. That being so, the subsequent proceedings were regular, and the decision of the court of quarter sessions was right.

BIGHAM J. I am of the same opinion. It is alleged that the justices, and therefore the court of quarter sessions, acted without jurisdiction, because the condition precedent contemplated by the proviso to s. 42, sub-s. 2, of the Act of 1872 had not been complied with, and because it is said that no objection to the renewal of this particular licence was ever taken or made. In my opinion, an objection was made. The head constable at the general annual licensing meeting made a report to the justices which was read in open court. It contained a request that the justices should withhold the renewal of the licence of the house in question until the adjourned meeting. Now, what is that request, in fact, but an objection to the renewal? Obviously, it means that the head constable objects to that being done then which might have been done that day. The justices might have allowed the renewal that day, and the head constable, by requesting them to hold it over till the adjourned meeting, objected to the renewal being granted that day. The justices undoubtedly

treated the request of the head constable as being an objection to the renewal, for they adjourned the application for the renewal to another day, and required the attendance of the holder of the licence on that day in accordance with the requirements of the statute. They therefore regarded it as an objection; and it would, I think, be to fritter away the business of the thing if we were to say that no objection to the renewal of the licence was made at the general annual licensing meeting. The appeal, therefore, must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Prideaux & Sons, for C. E. Hagon, Bridgwater.*

Solicitors for respondents: *Prior, Church & Adams, for Brice, Bridgwater.*

A. P. P. K.

MACKRELL AND ANOTHER *v.* JUSTICES OF BRENTFORD DIVISION OF MIDDLESEX.

1900
June 12.

Licensing Acts—Licence—Renewal—Licensed Premises not used for Sale of Beer for Long Period.

A beerhouse licence had been continuously renewed in respect of premises which had been licensed prior to May, 1869; but the licence had not been exercised and no beer had been sold on the premises for a long period:—

Held, that this fact gave the justices no jurisdiction to refuse to renew the licence to a new tenant who intended to carry on the premises as bonâ fide licensed premises, but that they were still limited to the four grounds of objection specified in s. 8 of the Wine and Beerhouse Act, 1869.

CASE stated by quarter sessions for the county of Middlesex.

On July 1, 1899, C. A. Mackrell and R. H. Shepherd appealed to the quarter sessions from the refusal of the licensing justices of the Brentford Division of the county to grant by way of renewal a beerhouse certificate in respect of certain premises, known as the Britannia Tap Beerhouse at Twickenham, to Shepherd, as the occupier of the premises.

It appeared that the premises were premises in respect of

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which a beerhouse licence for the sale by retail of beer and cider to be consumed on the premises was in force on May 1, 1869, and that the licence had been continuously renewed down to and including the year 1898, but that as a matter of fact no beer had been sold on the premises for at least twenty-eight years. No signboard was exhibited nor any indication of a licence, except that the words "Licensed, &c.," were painted in small letters over the door. The premises stood back thirty yards from the high road in an inclosed yard, and they contained no fittings for the sale of beer. The licence had been held by the manager of a firm of brewers, who was resident on the premises, but was not expected by them to trade there. The brewers, who were the lessees of the premises, also used them as a wholesale store for their beer. In 1898 the term of their lease expired, and the appellant Mackrell became by purchase the owner of the premises. In January, 1899, application was made to special transfer sessions for the transfer of the licence from the brewers' manager to the appellant Shepherd, who was the tenant of the premises under the appellant Mackrell, and the licensing justices then for the first time became aware that the licensee had failed to exercise his rights to sell beer on the premises for a long period. The application was refused on the authority of *Reg.* v. *Cotham.* (1)

At the general annual licensing meeting for the Brentford Division the appellant Shepherd duly applied for a renewal to himself, as real resident holder and occupier of the premises, of the certificate previously granted to and held by the brewers' manager. The appellant Shepherd had the bonâ fide intention of selling beer on the premises. Notice of objection was given on the ground that no beer had been sold on the premises for many years, and that the beerhouse was not required for the needs of the neighbourhood; but no objection was made on any of the four grounds applicable to beerhouse licences prior to May 1, 1869, by s. 8 of the Wine and Beerhouse Act, 1869. The licensing justices refused the application, and the quarter sessions upheld their decision subject to this special case.

Bruce Williamson, for the appellants. *Reg.* v. *Cotham* (1) is

(1) [1898] 1 Q. B. 802.

a decision on s. 4 of the Alehouse Act, 1828, and affects the transfer and not the renewal of licences. Where there is an application for the transfer of a licence, the premises for which the transfer is asked must no doubt have been "theretofore kept" as an inn or alehouse. But that is not so in the case of an application for a renewal. In that case the renewal can only be refused on one of the four grounds specified by s. 8 of the Wine and Beerhouse Act, 1869. *Symons* v. *Wedmore* (1) shews that where the licence has not expired a new tenant may apply for a renewal. The appellant, therefore, being admittedly the tenant of premises which have been continuously licensed since 1869, the justices had no jurisdiction to refuse his application for a renewal on any ground other than the four specified by s. 8 of the Wine and Beerhouse Act, 1869.

GRANTHAM J. In this case it certainly seems inconsistent, considering all the legislation that there has been on the subject of licences and licensed houses, that a very important question should have been left altogether out of sight. The question, no doubt, is not precisely raised by this case, but it is whether magistrates have jurisdiction to refuse to renew an alehouse licence which has been held continuously since 1869, when the applicant for renewal has not carried on and does not intend to carry on business on the premises for which he seeks the renewal of the licence. That question is, however, not exactly what we have to decide, and we are limited to the facts as found by the special case. It appears that the premises in question were licensed as a beerhouse in 1869, and have been continuously licensed ever since. An application is now made for renewal on the part of a new tenant of the premises, who bonâ fide intends to carry on the business of a beerhouse keeper on the premises. Until now, although the licence has been granted and continuously renewed, it appears never to have been exercised. The question is whether the magistrates had any jurisdiction to refuse the application on the grounds that further beerhouse accommodation was not required in the neighbourhood, and that the licence had not

(1) [1894] 1 Q. B. 401.

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been exercised for many years. In my opinion the magistrates were wrong, and they had, I think, no power under the circumstances to refuse the application. The section seems quite clear, and the grounds on which the application was refused were clearly not any of the four grounds specified in s. 8. If no beer had been sold on the premises for a year or for a few months only, it is clear that that would have been no ground for refusing the licence; and the justices seem to me to have weakened their case by saying that further beerhouse accommodation was not needed. That is not one of the specified grounds of refusal. It seems to me that we are bound by ss. 8 and 19 of the Wine and Beerhouse Act, 1869, to say that this house was in fact a privileged house as constituted by those sections, and there is no ground for saying that it has forfeited its privilege. The justices and the quarter sessions were therefore wrong, and this appeal must be allowed.

CHANNELL J. I have arrived at the same conclusion. It is no doubt somewhat difficult to follow all the Licensing Acts, and our difficulty is increased because the case is argued only on one side. But, so far as I can see, the applicant was entitled to have the renewal for which he asked, by virtue of s. 19 of the Act of 1869 as extended by s. 7 of the Act of 1870. A person, therefore, who was licensed in 1869 can apply for a renewal, and can only be refused on one of the four specified grounds. The fact that no beer has been sold on the premises is not one of such grounds. Where such a person, having got his licence renewed, moves out of the premises and some other person comes into the premises, the question is what his position is. *Reg.* v. *Cotham* (1) is an authority to shew that when the business is not being actually carried on on the premises the business cannot be transferred; but the reason for that is that the transfer machinery does not apply in such a case. The applicant, therefore, here could not have got a transfer of the licence; but what is his position at the end of the year? *Symons* v. *Wedmore* (2) seems to me a clear authority that, although he has not got a transfer of the licence, he may come

(1) [1898] 1 Q. B. 802. (2) [1894] 1 Q. B. 401.

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and ask for a renewal. The renewal can only be refused on one of the four specified grounds, and, that being so, the justices were wrong in refusing it on any other ground. It seems to me that *Reg.* v. *Cotham* (1) does not apply, but that it only shews that the machinery for transferring a licence was not applicable to such a case as the present.

I agree in thinking that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *C. Robinson & Co.*

A. P. P. K.

THE QUEEN *v.* BELL.

1900

May 24.

Lunatic—Pauper Lunatic—Reception Order—Jurisdiction of Justice—Workhouse situate outside Union—Poor Law Amendment Act, 1844 (7 & 8 *Vict. c.* 101), *s.* 56—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 14, 24.

By s. 14 of the Lunacy Act, 1890, provision is made for bringing paupers who are lunatics and proper to be sent to an asylum before "a justice having jurisdiction in the place where the pauper resides." A pauper who was chargeable to a union became a lunatic while residing in the workhouse infirmary, which was situate outside the boundaries of the union:—

Held, that a justice having jurisdiction in the union to which the workhouse belonged had power to deal with the case, since s. 56 of the Poor Law Amendment Act, 1844, applied, and the workhouse must, therefore, be considered as situated in the parish to which the lunatic was chargeable.

RULE NISI for a mandamus.

The guardians of the poor of the City of London Union are incorporated pursuant to 5 & 6 Will. 4, c. 69, and the statutes amending the same, for the relief of the poor of the union, the boundaries of which are coterminous with the boundaries of the county of the City of London.

Acting under s. 10 of 59 Geo. 3, c. 12, the guardians have provided at Bow, in the Poplar Union, within the county of London but outside the boundaries of the county of the City of London and the liberties thereof, and geographically situate

(1) [1898] 1 Q. B. 802.

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outside the City of London Union and inside the Poplar Union, a workhouse infirmary for the reception of paupers who may, by order of the guardians of the poor of the City of London Union, be admitted and maintained therein while chargeable to the City of London Union. This infirmary is part of the workhouse of the City of London Union.

On January 11, 1899, a pauper named Samuel Glover became chargeable to the City of London Union, and was admitted to the City of London Union Workhouse at Homerton, where he continued chargeable to the union until May 22, 1899, when he was transferred by an order of the guardians to the infirmary at Bow. While there he became a lunatic, and, on October 3, 1899, the medical superintendent gave notice to the relieving officer of the Poplar Union that Glover was a lunatic and was in the lunatic ward of the infirmary, and was a fit and proper person to be removed to an asylum for care and treatment, and was not a fit and proper person to remain in the infirmary, and at the same time requested the relieving officer to take steps to have Glover taken before a justice of the peace in order that he might be removed to an asylum. The relieving officer refused to take any steps in the matter, on the ground that it was no part of his duty to deal with lunatics chargeable to and residing in the workhouse of the City of London Union.

On October 9, 1899, application was made to one of the aldermen of the City of London sitting at the Guildhall, and acting as a justice of the peace in and for the county of the City of London, to order Glover to be brought before him or some other justice of the peace having jurisdiction in the county of the City of London, with a view to making an order for his detention. The alderman refused to make an order under s. 14, sub-s. 3, of the Act, on the ground that he had no jurisdiction to do so; and the guardians obtained this rule nisi for a mandamus to him to hear and determine the application.

R. D. Muir shewed cause against the rule. The alderman had no jurisdiction to make the order. The case came within s. 24, sub-s. 6, of the Lunacy Act of 1890, and the like proceedings had to be taken "as by this Act provided in the case of a

pauper deemed to be a lunatic and a proper person to be sent to an asylum"—that is to say, under s. 14. By that section the justice to deal with the matter is "a justice having jurisdiction in the place where the pauper resides"—that is to say, a magistrate for the administrative county of London, and not an alderman of the City of London. This is plain from s. 6 of the Lunacy Act, 1891. (1)

(1) By the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 56, "And be it enacted that, for the purpose of relief, settlement, and removal of poor persons, and the burial of the poor, the workhouse of any union or parish . . . . shall be considered as situated in the parish to which each poor person respectively to be relieved, removed, or buried, or otherwise concerned in any such purpose, is or has been chargeable. . . . ."

By the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 14, "(1.) Every medical officer of a union who has knowledge that a pauper resident within the district of the officer is or is deemed to be a lunatic and a proper person to be sent to an asylum, shall, within three days after obtaining such knowledge, give notice thereof in writing to the relieving officer of the district, or, if there is no such officer, to an overseer of the parish where the pauper resides.

"(2.) Every relieving officer and every overseer of a parish of which there is no relieving officer, who respectively have knowledge, either by notice from a medical officer or otherwise, that any pauper resident within the district or parish of the relieving officer or overseer is deemed to be a lunatic, shall, within three days after obtaining such knowledge, give notice thereof to a justice having jurisdiction in the place where the pauper resides.

"(3.) A justice, upon receiving such notice, shall by order require the relieving officer or overseer giving the notice, to bring the alleged lunatic before him, or some other justice having jurisdiction in the place where the pauper resides. . . . ."

By s. 24, "(3.) No lunatic shall be detained against his will or allowed to remain in a workhouse for more than fourteen days from the date of a certificate under this section without an order under the hand of a justice having jurisdiction in the place where the workhouse is situate."

"(6.) If, in the case of a lunatic being in a workhouse, the medical officer thereof does not sign such certificate . . . . or if . . . . an order is not made under the hand of a justice for the detention of the lunatic in the workhouse, ... the medical officer of the workhouse shall forthwith give notice in writing to a relieving officer of the union to which the workhouse belongs that a pauper in the workhouse is a lunatic and a proper person to be sent to an asylum, and thereupon the like proceedings shall be taken by the relieving officer and all other persons for the purpose of removing the lunatic to an asylum . . . . as by this Act provided in the case of a pauper deemed to be a lunatic and a proper person to be sent to an asylum. . . . ."

By s. 286, "(1.) Where a pauper lunatic is sent to an institution for

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Macmorran, Q.C., and *R. Cunningham Glen*, in support of the rule. This pauper lunatic was residing constructively in the City of London, and an alderman of the City was, therefore, the right person to make the order. The pauper was in the workhouse for the purpose of relief, as is shewn by s. 286, sub-s. 1, of the Lunacy Act, 1890, and therefore, by s. 56 of the Poor Law Amendment Act, 1844, the workhouse is to be considered as being situated in the City of London.

Sect. 6 of the Lunacy Act, 1891, merely gives a justice of the county in which the workhouse is situate power to order a lunatic to be removed to a county asylum if he thinks fit, and that section, therefore, does not affect this question.

RIDLEY J. We think the rule ought to be made absolute.

There may be some little difficulty in fitting the sections of the Acts on to the case in question, although it seems to be a case which must frequently occur in practice, but it seems to me that the chain of reasoning is something like this. By s. 24 of the Lunacy Act, 1890, in the case where a lunatic is in a workhouse, it is provided that the medical officer in such case is, first of all, to give notice to a relieving officer of the union to which the workhouse belongs, and thereupon the like proceedings are to be taken as would be taken in the case of a pauper deemed to be a lunatic. That refers us back to s. 14, sub-s. 2, which provides that "Every relieving officer and every overseer of a parish of which there is no relieving officer, who respectively have knowledge either by notice from a medical officer or otherwise that any pauper resident within the district or parish of the relieving officer or overseer, is deemed to be a lunatic, shall, within three days after obtaining

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lunatics. . . . he shall be deemed to be chargeable to the union from which he was sent. . . ."

By the Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 6, "Where a workhouse is situate in a county which does not include the union to which the workhouse belongs, a summary reception order made by a justice of the county in which the workhouse is situate may order a lunatic in the workhouse to be received in any asylum, in which pauper lunatics chargeable to the union, to which the workhouse belongs, may legally be received."

such knowledge, give notice thereof to a justice having jurisdiction in the place where the pauper resides." So far there is no difficulty; but in the present case the workhouse at Bow, which is the workhouse belonging to the City of London Union, is situated outside the boundaries of the City of London, and the question arises whether in such a case "a justice having jurisdiction in the place where the pauper resides" is an alderman of the City of London, or whether it is a magistrate of the administrative county of London who would be the magistrate having jurisdiction where the workhouse is. An alderman of the City of London would have jurisdiction in the place where the pauper resides if it can be made out that the pauper resides in the place to which he is chargeable, although the workhouse in which he is actually living is outside that union and inside the administrative county of London. Either view might have been adopted by the Legislature, as it seems to me, and there would have been some difficulty in my mind if there had been nothing to help us, and to shew in what sense these words are used. Where does the pauper reside? Is he to be taken to have his residence locally in the place where stands the workhouse in which he dwells? If so, those words would seem to indicate that a justice of the county of London would be the person who ought to act, since, by the 3rd and 4th sub-sections of the 24th section, it is enacted that no lunatic shall be detained against his will or allowed to remain in the workhouse for more than fourteen days from the date of a certificate under the section "without an order under the hand of a justice having jurisdiction in the place where the workhouse is situate." In that case it appears clear that the justice who is to make the temporary order for detention is a justice having jurisdiction where the workhouse is—that is to say, in the administrative county of London, although the order must be made upon the application of the relieving officer of the union to which the workhouse belongs. Whether it be a temporary order for detention that is asked for, or an order for removal to a lunatic asylum, the application has to be made by a relieving officer of the union to which the workhouse belongs. But, on looking further into the matter,

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we see that s. 56 of the Poor Law Amendment Act, 1844, has application to the case. Now, by that section it was enacted that for the purposes of relief, settlement, and removal of poor persons, and the burial of the poor, the workhouse of any union shall be considered as situated in the parish to which such poor person respectively to be relieved, removed, or buried is or has become chargeable. Was this application under the Lunacy Act for the order (known as a summary reception order) for the removal of this pauper to an asylum made for the purposes of relief within s. 56 of the Poor Law Amendment Act, 1844? It is argued that it was not, because that merely means that that is where the payment is to come from. I think that is not so. It seems to me when the Act says "for the purposes of relief," that relief continues whether it be given to a pauper situate in the workhouse as a pauper, or whether the payments have further to be continued for him as a lunatic under the 286th section of the Lunacy Act, 1890, which provides that a pauper lunatic is still to remain chargeable to the union to which he belongs, and to which he has been chargeable as a pauper. If that is so, we get the link which was required to make out logically the jurisdiction of the alderman of the City of London to grant this order, because he then comes within the proper meaning of the words, "a justice having jurisdiction in the place where the pauper resides"—that is to say, though the pauper lunatic is actually, no doubt, in a workhouse which is outside the City of London Union, yet by virtue of the 56th section of the Poor Law Amendment Act, 1844, that workhouse must be considered as situate in the union to which he is chargeable.

If that is the correct mode of reasoning, the alderman sitting for the City of London has jurisdiction to make the order which was required of him. That seems to me to be a sound chain of reasoning, and for that reason I think he has jurisdiction to make the order.

The 6th section of the Lunacy Act, 1891, does not require, as it seems to me, much explanation. It is independent of what I have been saying, and it would not in the least follow, even if it dealt with precisely the same subject-matter as that

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with which we are dealing, that because it gives the jurisdiction to the justice where the workhouse is situate it would take it away from the other justice. It is perfectly possible that either would have that jurisdiction upon an occasion of emergency, and that it was given for that purpose; but it has been pointed out to us that it had another purpose, namely, to give the justices power to order the removal to a county lunatic asylum, and not to one known as the City Asylum.

Under these circumstances, I think there was jurisdiction in the alderman, and he has power to make the order. We think, therefore, the rule must be made absolute.

BIGHAM J. I agree.

Rule absolute.

Solicitors for applicants: *Rexworthy, Barnard & Co.*
Solicitor for respondents: *The City Solicitor.*

A. P. P. K.

BENNETT *v.* HARDING.

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June 14.

Local Government — Public Health — Sanitary Convenience — Workplace — Persons in Attendance — Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 38.

Sect. 38 of the Public Health (London) Act, 1891, enacts that every factory, workshop, or workplace shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, regard being had to the number of persons employed in or in attendance at such building:—

Held, that a stable-yard and stables at which a large number of cabmen were daily in attendance for the purpose of hiring cabs was a workplace within the meaning of the section, and must, therefore, be provided with sufficient and suitable sanitary conveniences for the cabmen.

CASE stated by a metropolitan magistrate.

Harding, the respondent, was summoned to answer a complaint made by Bennett, the appellant, who was sanitary inspector to the Holborn District Board of Works, charging that he, being the occupier or owner of premises situate at 9, 10, 16, 17, 18, 27, 35, 38, and 44, Ormond Yard, within the

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district of the board, did on January 1, 1900, unlawfully fail to provide sufficient and suitable accommodation in the way of sanitary conveniences for the persons employed in or in attendance at the said premises, contrary to the provisions of s. 38 of the Public Health (London) Act, 1891. At the hearing of the complaint the following facts were admitted or proved in evidence:—

That the appellant was the sanitary inspector to the board of works for the Holborn district.

That the board of works is the sanitary authority for the district, and had duly authorized the appellant to serve a notice, as required by s. 38, sub-s. 2, of the Public Health (London) Act, 1891, upon the respondent, and to make the complaint.

That the notice had been duly served.

That the premises in question consisted of ten stables and a stable-yard, and were in the occupation of the respondent, who is a cab-proprietor in a large way of business.

That the respondent kept upon the premises 110 horses and a large number of cabs, of which he was the owner.

That the respondent employed upon the premises a number of men as horsekeepers and cabcleaners for the purpose of attending to the horses and cabs.

That the business of the respondent consisted in letting out the cabs and horses by the day to drivers, and that these cab-drivers were daily in attendance at the premises for the purpose of hiring the horses and cabs, changing horses, and returning the horses and cabs after use.

That the horsekeepers and cabcleaners when not at work lived with their respective families in different rooms, having sanitary conveniences, situate over different portions of the premises.

That in the stables and stable-yard there was no accommodation in the way of sanitary conveniences for the horsekeepers and cabcleaners employed therein.

That many complaints of the want of sanitary conveniences had been made both to the appellant and to the board.

The magistrate dismissed the complaint, as he was of opinion that the premises were not a workplace ejusdem generis with

a factory or workshop, and, further, that the cabdrivers were only in attendance as customers, and that there was no duty thrown upon the respondent to provide sanitary conveniences for them; but he stated this case for the opinion of the Court. (1)

Courthorpe Munroe (*W. Leese* with him), for the appellant. The expression "workplace" means a place where persons are employed or intended to be employed in any trade or business. To limit it to places ejusdem generis with factory or workshop would unduly narrow the scope of the Act. This was a workplace, and it is plain that it was the kind of place in which sanitary conveniences should be provided. The case itself finds that the cabmen were "in attendance."

Macmorran, Q.C. (*Ellis Griffith* with him), for the respondent. The cabmen were in the position of customers. They came to hire cabs as people go to a bicycle shop to hire bicycles. The Act never contemplated that such persons should be considered as "in attendance" at such places. "Persons in attendance" means persons who though not actually employed on the premises are attending and serving the persons who are so employed.

A workplace must be a building, as appears from the section, and it must be a building where persons are employed to do work of a similar character to that done in factories or workshops.

GRANTHAM J. In my opinion the learned magistrate was wrong in this case, and I think that he ought to have convicted the respondent.

(1) By the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 38, "(1.) Every factory, workshop, and workplace, whether erected before or after the passing of this Act, shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, regard being had to the number of persons employed in or in attendance at such building . . . .

"(2.) Where it appears to a sanitary authority that this section is not complied with in the case of any factory, workshop, or workplace, the sanitary authority shall, by notice served on the owner or occupier of such factory, workshop, or workplace, require him to make the alterations and additions necessary to secure such compliance, and if the person served with such notice fails to comply therewith, he shall be liable to a fine. . . ."

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Grantham J.

He states in the special case that it was admitted or proved in evidence before him that these cabdrivers were daily in attendance at the premises for the purpose of hiring horses and cabs, changing horses, and returning the horses and cabs after use. The business carried on by the cabdrivers at the yard, therefore, did not consist merely in each taking out a cab and horse in the morning and returning it at night, but they also came to the yard for the purpose of changing their horses during the day. It seems to me very necessary that sanitary accommodation should be provided for such men while they are waiting about the stable-yard. The other question raised by the case is whether or not this was a "workplace" within the meaning of the section. It seems to me that these premises come precisely within the meaning of the expression "workplace." It is a place where work is being done, and it is a place confined to a definite and ascertainable area. I think that the magistrate was wrong in holding that the word "workplace" meant something ejusdem generis with factory or workshop, and must be confined to a place in which something was being manufactured or made. If it were so, a great deal of the value of the section would be taken away. I think that this was a workplace, and that the cabmen were in attendance at it, and therefore that suitable accommodation in the way of sanitary conveniences should have been provided for them. The case must, therefore, be remitted to the magistrate with a direction to convict the respondent.

CHANNELL J. I agree. The first question that we have to answer is whether this cabyard is a workplace. Even assuming that the doctrine of ejusdem generis applies—I do not say that it does apply—but assuming that it does, it seems to me clear that the similarity must be a similarity in regard to the subject-matter of the Act of Parliament. The Act is passed for the benefit of persons who, like those employed in factories and workshops and those in attendance at them, are kept in large numbers and for long periods on certain premises, and are therefore likely to require the accommodation of sanitary conveniences, which the Act says shall be provided for them. In

that view, I think these stables and this cabyard were analogous to a factory or a workshop, since a number of people were occupied about them and were kept on the premises for some time. So that, even if a workplace must be construed as being something analogous to a factory or a workshop, this was in my opinion within the meaning of that word. I think that a workplace must be a place where some work is being perpetually or permanently done. I do not say that the mere presence of workmen in repairing a private house would make it a workplace; but in my opinion these premises did constitute a workplace within the meaning of the Act. Then comes the question, which is not really raised before, as to who is to be the judge of the sufficiency of the sanitary accommodation provided. Is it to be the magistrate, or the sanitary authority? The Act is not clear on the point; but, whoever it may be, the section says that regard is to be had to the number of persons employed in or in attendance at the place. That means that when it is decided that a place is a workplace, then, in considering the amount and sufficiency of the sanitary accommodation, not only the persons who are actually employed on the premises are to be taken into consideration, but also the persons who have to be on the premises for any considerable length of time, and are likely therefore to need and to use the accommodation of sanitary conveniences if they are provided. It seems to me that the phrase "in attendance" means persons who are in fact on the premises for any substantial period, and I do not think that they are any the less in attendance on the premises because they are there as customers. It does not seem to me that the purpose or object for which they are there affects the matter one way or the other. If persons are brought on to premises in large numbers and have to wait there for a considerable period of time, then, if those premises constitute a workplace, I think that those persons are in attendance at that workplace, and that they must be taken into consideration when the question of the sufficiency of the sanitary accommodation provided or to be provided has to be gone into.

In the case before us the magistrate has found that these cabmen were in attendance, and he has not set out the facts

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sufficiently to enable us to say whether he was right in so finding or not. They, therefore, come within the section as persons in attendance at a workplace, and this appeal succeeds.

Appeal allowed. Case remitted to magistrate.

Solicitor for appellant: *Matthew H. Hale.*
Solicitors for respondent: *Marpole & Marpole.*

A. P. P. K.

1900
April 25, 30.

[IN THE COMMERCIAL COURT.]

TURNBULL, MARTIN & CO. *v.* HULL UNDERWRITERS' ASSOCIATION, LIMITED.

Insurance, Marine—Loss of Freight—Exception—"Claim consequent on Loss of Time."

A policy of insurance was effected on the outward voyage of a steamer from London to Australian ports for freight expected to be earned on the homeward voyage, the subject-matter being described as "upon freight of frozen meat, chartered or as if chartered"; the policy was warranted "free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." The ship, which was a general ship, having three of her five holds fitted with refrigerating machinery for frozen meat, arrived at Sydney on her outward voyage, and while discharging her outward cargo a serious fire broke out on board which destroyed the refrigerating apparatus, in consequence of which it became impossible to carry frozen meat upon the return voyage to England. In an action on the policy for total loss of freight on frozen meat:—

Held, that the case could not be distinguished from *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, [1897] A. C. 609, on the ground that the freight was not chartered freight; that the claim was therefore consequent on loss of time within the meaning of the exception, and that the underwriters were not liable.

ACTION tried in the Commercial Court before Mathew J. The facts, which are stated at length in the judgment, appear sufficiently in the head-note for the purpose of the argument.

Carver, Q.C. (*J. A. Hamilton* with him), for the plaintiffs. Apart from the warranty, the policy covers a loss of freight caused in the first instance by a peril insured against but

occasioned by loss of time: *Jackson* v. *Union Marine Insurance Co.* (1) The warranty is not applicable to the facts of the case; the plaintiffs have lost their claim for freight, not through the loss of time, but owing to the damage to the machinery; the result of that damage was that the ship ceased to be a refrigerating ship for that voyage, and was unable to take a particular class of goods on board owing to a peril insured against. The case is distinguishable from *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (2); there the vessel was the subject of a time charter, and the freight was chartered freight, which the House of Lords held to be lost because the time charter was lost.

[MATHEW J. In the present case the freight was to be chartered or as if chartered; if it is to be treated as chartered, the warranty is applicable, and the case is within *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (2)]

The phrase "chartered or as if chartered" means "contracted for or as if contracted for," the clause being a wide one, and intended to cover even an expectation of freight. The ship lost part of the profits of her voyage, owing, not to delay or loss of time, but to the loss of her refrigerating machinery.

Joseph Walton, Q.C. (*Theobald Mathew* with him), for the defendants. This claim is consequent on loss of time within the meaning of the warranty. The insurance was of freight, which by the terms of the policy was to be treated as if it were chartered freight. The case is indistinguishable from *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (2); if in the judgments in that case the words "refrigerating machinery" be read instead of "main shaft," the cases are practically identical. It is immaterial that the freight was not chartered freight, for the principle of law applicable cannot be affected by the fact that the freight was booked at two or three times and places, and was not all due under one contract. If the repairs could have been effected in two or three days, the cargo could have been taken on board, and the freight would not have been lost; the loss of freight was caused by the ship not being ready in time, having regard to the nature of the goods

(1) (1874) L. R. 10 C. P. 125. (2) [1897] A. C. 609.

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to be shipped. The proper principle to apply is that the primary cause of the loss of freight must be a peril covered by the policy; but if that be not the cause of the loss unless accompanied by loss of time, the clause of warranty applies.

Carver, Q.C., in reply.

Cur. adv. vult.

April 30. MATHEW J. This was an action to recover a total loss on a policy on freight on a cargo of frozen meat. The insurance was on the outward voyage of the SS. *Buteshire* for freight expected to be earned on the homeward voyage, and the risk was described in the following terms: "At and from London to any port or ports $\frac{\text{and}}{\text{or}}$ place or places in any order or rotation in Australia $\frac{\text{and}}{\text{or}}$ Tasmania $\frac{\text{and}}{\text{or}}$ New Zealand, risk to continue until steamer sails from final loading port on homeward voyage." The subject-matter was described as follows: "upon freight of frozen meat, chartered or as if chartered, on board or not on board, full interest admitted." The policy also contained the following special clause: "Chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." It was not disputed that the words "or otherwise" meant other perils insured against.

The evidence shewed that at the time when the vessel sailed no contracts had been secured by the plaintiffs for the shipment of frozen meat from the colonial ports, but such contracts were made and the homeward cargo was booked at Newcastle, Melbourne, and New Zealand ports while the vessel was making her outward voyage. Frozen meat must be shipped at the times mentioned in the contracts with shippers, and the shipments cannot be delayed. When the vessel is disabled from fulfilling her engagements, frozen meat in the ordinary course would be forwarded in another vessel. A delay, involving no great length of time, due to damage by perils insured against, either to ship or machinery, would prevent the vessel from earning freight contracted for, and would thus defeat the object of the adventure. The risk would, therefore, seem to be one which underwriters would be cautious about accepting.

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The *Buteshire* was fitted with refrigerating machinery of a special kind in three of her five holds. The other holds were used for ordinary cargo. The ship arrived at Sydney on October 15, 1898, and discharged her outward cargo. On October 18 a fire occurred on board, and so damaged her refrigerating machinery that she was disabled from carrying a cargo of frozen meat. Materials for the repair of the refrigerating machinery could not be procured at Sydney, and must have been brought from England, and the owners properly determined to send the vessel home with such ordinary cargo as she could procure, and to have the damage repaired in England. The earning of the freight was in this way rendered commercially impossible.

It was argued for the plaintiffs upon the authority of *Jackson* v. *Union Marine Insurance Co.* (1) that a delay due to a peril insured against, which frustrated the object of the voyage and prevented the vessel from earning her homeward freight, entitled the plaintiffs to recover as for a total loss. For the defendants reliance was placed on the terms of the warranty, and upon the decision in the case of *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (2) The loss, it was argued, was due not merely to the fire, but to the time which the repairs must have taken. The argument for the plaintiffs, on the other hand, that the claim was consequent not upon loss of time, but upon the disablement of the vessel by a peril insured against, was rejected by the Court of Appeal and the House of Lords in that case. The damage in both cases was of such a character that it became impossible to prosecute the voyage within the necessary time.

An attempt was made to distinguish the present case from the decision in *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (2) on the ground that this was not chartered freight; but the warranty applies not only to chartered freight, but to all freights; and the several contracts of affreightment made with shippers had the same operation as if they were grouped in a charterparty. In such case the result of the peril insured against would have been the same, namely, to disable the ship

(1) L. R. 10 C. P. 125. (2) [1897] A. C. 609.

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from fulfilling her engagements in proper time. It seems to me that no such distinction can be reasonably made. The ship was damaged by a peril insured against; her capacity to carry frozen meat was suspended until her machinery had been repaired. If she could have been repaired promptly, there would have been no loss of freight. The loss, therefore, was "consequent on loss of time" within the words of the warranty. I give judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Hollams, Son, Coward & Hawksley.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. J. B.

C. A.

1900

May 19.

[IN THE COURT OF APPEAL.]

PERCIVAL *v.* GARNER.

Employer and Workman—Compensation—"Undertaker"—Construction of Building—Contractor for Supply of Labour—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

An employer who, under a contract with a firm engaged in building operations on their own premises, supplies the labour for the brickwork, the workmen so supplied, although paid by him, being under the control while at work of the foreman of the building owners, is not an undertaker within the meaning of the Workmen's Compensation Act, 1897.

APPEAL from a decision of the judge of the Liverpool County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The respondent claimed compensation as the widow of a workman, whose death had been occasioned by an accident whilst he was in the employment of the appellant under the following circumstances. Messrs. Bowman & Co., a firm of chemical manufacturers, were putting up a new building upon their own premises; they provided the materials for the building, which was being erected from the plans of their own architect, and the men engaged in the building operations were under the control of their own foreman. Bowman & Co.

agreed with the appellant for the supply by him of labour for the brickwork, and under this agreement the appellant sent bricklayers and labourers as they were wanted for the work; the men so sent were under the supervision of Bowman & Co.'s foreman, the appellant not being responsible for any part of the work. The wages of the men supplied were paid by the appellant, whose profit was derived from the payment to him by Bowman & Co. of an extra halfpenny per hour on each man's time. The deceased, who was one of the bricklayers so supplied by the appellant, fell from a scaffolding while at work on the building and was killed. The learned judge was of opinion that the appellant was engaged in the construction of the building, and was an undertaker within the meaning of the Act; he therefore made an award in favour of the respondent. The employer appealed.

A. P. Thomas, for the appellant. The appellant was not an undertaker, for he was not a person undertaking the construction of a building within the meaning of s. 7, sub-s. 2, of the Act. (1) He no more undertook the construction by supplying the labour than a brickmaker would have done who supplied the bricks. Bowman & Co. were the undertakers and were liable under the Act.

M. V. D'Arcy, for the respondent. The county court judge was right. The deceased, even if in a sense temporarily employed by Bowman & Co., was still in the employment of the appellant and was paid by him; and the appellant, who derived a profit from the construction of the building by reason of the work done upon it by his own men, was one of the undertakers within the meaning of the Act.

A. L. SMITH L.J. The sole question which we have to determine is whether the proceedings for the assessment of

(1) By 60 & 61 Vict. c. 37 (The Workmen's Compensation Act, 1897), s. 7, sub-s. 1, "This Act shall apply only to employment by the undertakers as hereinafter defined . . . . on, in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding. . . . ."

By sub-s. 2, "undertakers" in the case of a building means "the persons undertaking the construction, repair or demolition."

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compensation have been brought against the right person. Under the Workmen's Compensation Act the proceedings must be taken against the persons undertaking the construction, repair, or demolition of the building. Who were the persons undertaking the construction in the present case? In my judgment, Bowman & Co. are the only persons who come within the definition of undertakers in s. 7, sub-s. 2. The building was being built on their own land from the plans of their own architect, and under the supervision and control of their own foreman; they wanted labour for the building, and went to the appellant to supply it, which, under an agreement with him, he did. In my judgment, it is impossible to hold that the appellant, who merely supplied the labour, was an undertaker within the meaning of the Act. I think, therefore, that the county court judge was wrong, and that this appeal should be allowed; the proceedings for compensation have been taken against the wrong person.

VAUGHAN WILLIAMS and ROMER L.JJ. concurred.

Solicitors for appellant: *Pritchard, Englefield & Co., for J. H. Glover, Liverpool.*

Solicitors for respondent: *Metcalfe, Birkett & Rowlatt, for C. Spencely, Liverpool.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1900
May 26.

HOLMES *v.* GREAT NORTHERN RAILWAY COMPANY.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

An engine-cleaner, who had been employed by a railway company at their station at K., was directed by his employers to work in a new engine-shed at H., about four miles distant. The workman, who lived near K., was conveyed by the railway company free of charge in one of their trains to their station at H., reaching there a short time before the hour for commencing work in the shed, and was taken back free of charge at the end of his day's work. While crossing the line at the station at H. in order to get to his work in the engine-shed, and shortly before the hour at which work began, he was killed by a passing train:—

Held, that the employment of the workman commenced when he got into the train to be conveyed to his work, and not on his arrival at the engine-shed, and that the accident arose out of and in the course of his employment within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

APPEAL from a decision of the judge of the Clerkenwell County Court upon an application for compensation under the Workmen's Compensation Act, 1897.

The respondent was the mother of a workman who had been killed while in the employment of the appellants. The deceased man was an engine-cleaner, and until November 4, 1899, had been employed in that capacity by the appellants at their station at King's Cross; on that day he was told by the foreman that on the following Monday he would have to go to work at a new engine-shed which had been built by the appellants at Hornsey, about four miles from King's Cross. Accordingly on the Monday he went with a fellow-workman by train from King's Cross to Hornsey, no fare being demanded of them for the journey, and reached Hornsey at 5.45 A.M., his work in the shed beginning at 6 o'clock. At Hornsey Station he asked his way to the shed, and was told that he could go either by the bridge or the subway; he went by one of these

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roads, and did a day's work in the shed; it did not appear by what route he went back to the platform after his work was finished. On the following day he again went to Hornsey by the same train, and with other engine-cleaners who were going to the shed crossed the line in order to save time, that being a shorter route than either the bridge or the subway; while crossing the line the deceased was knocked down by an express train and fatally injured. On this occasion, also, the engine-cleaners who travelled by the train had no tickets, and it appeared in evidence that, while men living at a distance from their work had in ordinary cases to pay one-fourth of the railway fare, men living at King's Cross and ordered to work temporarily elsewhere on the line were conveyed by the appellants free of charge. It was not suggested by the appellants that the accident was attributable to serious and wilful misconduct on the part of the deceased. The county court judge was of opinion that the employment of the deceased began at King's Cross, and that the accident arose out of and in the course of his employment whilst proceeding to that part of the employers' premises in which he had been directed to work; he made an award of 150*l.* in favour of the respondent. The railway company appealed.

Montague Lush (*A. Clutton Brock* with him), for the appellants. The accident did not arise out of and in the course of the employment of the deceased. The employment did not begin until he arrived at the engine-shed at Hornsey, where he was to start work at 6 o'clock. He was his own master after his arrival at Hornsey, and could do as he liked till the hour for commencing work; during that interval he was not in any way a servant of the railway company. Even assuming that a contract to carry the deceased to Hornsey can be implied, the accident did not arise out of his employment or out of the contract to carry; it arose because he went to his work by the wrong route. It might fairly be contended that the appellants would be liable under the Act if the deceased had been obliged to cross the line to get to his work, even although the work had not begun, but he was not invited by the appellants

to enter upon the dangerous zone. It is essential to shew that the workman has been invited by his employer on to one of the dangerous places mentioned in the Act; here the deceased's employment was not on the railway, nor was he invited on to the railway by the appellants. The case is concluded by the decision of the Court of Appeal in *Holness* v. *Mackay*. (1)

[A. L. SMITH L.J. Suppose the man had slipped while going over the bridge, and had broken his leg.]

In such a case the accident would not have arisen "out of" the employment within the meaning of the Act.

W. H. Duckworth, for the respondent, was not called upon.

A. L. SMITH L.J. I think that the judgment of the learned county court judge, which I have read, is entirely right. The deceased was admittedly employed by the appellants. They had started a new goods-shed at Hornsey, and he had been told to go there and clean engines; it was his duty to obey the order. He was taken there for nothing by the appellants in one of their trains, and he undoubtedly went there on the business of his employers; he arrived there a quarter of an hour before his actual work started in the shed, and in crossing the line to get to the shed he was run over. Under those circumstances, was the learned county court judge justified in finding that the accident arose out of and in the course of the employment of the deceased? I am of opinion that he was. It must be borne in mind that there is a difference between the beginning of a man's employment and the beginning of his work; for instance, in a coal-pit the employment begins as soon as the miner leaves the bank, although he may have some distance to go to his actual work after he has got down the pit. In the present case I think there was satisfactory proof of an implied contract on the part of the appellants to take the deceased from King's Cross to Hornsey, there to find him work, and to take him back again when his day's work was over. Then comes the question, was the deceased being employed on the railway at the time of the accident? In my opinion he was: he was going across the railway to the engine-shed. It

(1) [1899] 2 Q. B. 319.

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is contended that he ought to have gone by the bridge or the subway; but in my opinion, when we once get the fact of employment at King's Cross, all the rest follows, unless the appellants are able to make out a case of serious and wilful misconduct, which they have not attempted to do.

VAUGHAN WILLIAMS L.J. I entirely agree with the judgment that has just been delivered. But I wish to add that in my opinion it does not necessarily follow that, because an employment has once begun, it goes on until the time when under the contract of employment it is to end, for a workman may in the course of his employment do something for himself which has nothing to do with his master's business; if that is so, a man may make a break in his employment. But that doctrine has no application in the present case, for the deceased was crossing the line in the very act of getting to his work.

ROMER L.J. I agree.

Appeal dismissed.

Solicitor for appellants: *R. Hill Dawe.*
Solicitor for respondent: *Slater.*

W. J. B.

TYLER *v.* KINGHAM & SON, LIMITED.

1900
May 18.

Adulteration—Sale to Prejudice of Purchaser—Defence that Article Bought with Written Warranty—Subsequent Proceedings against Wholesale Merchant—Certificate of Analyst—Evidence—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 14, 21, 25—*Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 6, 7, 12.

Where, upon the hearing of a summons under s. 6 of the Sale of Food and Drugs Act, 1875, the defendant establishes the defence under s. 25 of the Act that he bought the article with a written warranty and sold it in the same state as when he purchased it, the certificate of the public analyst used in those proceedings is not evidence in subsequent proceedings before justices against the person from whom the defendant purchased the article.

Upon the hearing of a summons under the above section for selling as butter an article which was not of the nature, substance, and quality of the article demanded, the certificate of the public analyst shewed the article sold to be margarine; the summons was, however, dismissed on the defendant proving a purchase with a written warranty from the respondents. A summons was then taken out against the respondents under s. 6 of the Margarine Act, 1887, for delivering the margarine in a package not marked as required by the section, and at the hearing before justices the same certificate was tendered as evidence against the respondents, but was rejected:—

Held, that the certificate was not evidence against the respondents that the article sold and delivered by them was margarine, and that the evidence was properly rejected.

CASE stated by justices of Middlesex sitting at Brentford.

The respondents had been summoned to answer an information laid by the appellant charging that they, being persons dealing in margarine, did not conform to one of the regulations referred to in s. 6 of the Margarine Act, 1887, inasmuch as that they delivered to one Longstreeth on or about September 12, 1899, a certain package containing margarine without having durably marked on the top, bottom, and sides thereof in printed capital letters not less than three-quarters of an inch square the word "margarine." Upon the hearing of the summons the following facts were proved or admitted.

The appellant was an inspector of weights and measures duly appointed by the Middlesex County Council, and the

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respondents were a limited liability company carrying on business at Brentford as wholesale grocers.

On September 21, 1899, the appellant purchased from one Longstreeth, a retail grocer at Brentford, with the intention of submitting the same for analysis, an article which was represented to him as being what he asked for, namely, butter. At the time of the purchase the appellant complied in every respect with the requirements of s. 14 of the Sale of Food and Drugs Act, 1875, and Longstreeth accepted one of the three parts into which the article purchased had been divided by the appellant. On the same day the appellant delivered one of the other parts of the article to the public analyst for the county of Middlesex, who, on October 3, 1899, gave a certificate declaring the result of his analysis to be that the article contained 10 per cent. of foreign fat, not butter fat. After the certificate had been given the appellant obtained two summonses against Longstreeth, one under s. 6 of the Sale of Food and Drugs Act, 1875, and one under s. 6 of the Margarine Act, 1887. The article from which the sample was purchased by the appellant was purchased by Longstreeth, with no intention of having it analyzed, from the respondents, who delivered it to him with an invoice and in a tub marked "Pure Butter." Longstreeth purchased the article from the respondents in the ordinary way of trade for resale, and did not act as the agent of the respondents in so reselling.

The summons against Longstreeth under s. 6 of the Food and Drugs Act, 1875, was heard on October 24, 1899, before the justices in petty sessions at Brentford, who found as a fact that the article purchased by the appellant was margarine, but that the words branded on the tub, together with the invoice sent by the respondents, amounted to a warranty given by the respondents to Longstreeth that the article was butter; they accordingly dismissed the summons. Upon the hearing Longstreeth did not dispute the accuracy of the analyst's certificate; the present respondents were not called as witnesses, nor were they present or represented at the hearing. The summons against Longstreeth under the Margarine Act was thereupon abandoned by the appellant.

The appellant then applied for and obtained a summons against the respondents under s. 6 of the Margarine Act, 1887, which came on for hearing on November 2 and 23, 1899. Upon the hearing, the facts above set out having been proved or admitted, the appellant offered in evidence the said certificate of the public analyst; but it was objected on the part of the respondents that it was not admissible as evidence against them. The respondents did not require the analyst to be called as a witness, but contended that, even admitting that the article sold by Longstreeth to the appellant was at the time of sale in the same state and condition as it was when sold and delivered by the respondents to Longstreeth (on which point, however, they intimated that they were prepared to call evidence if necessary), the summons ought to be dismissed on the grounds: (1.) That the summons being in respect of a sale by the respondents to Longstreeth the appellant was not a competent prosecutor; and that, further, it was necessary to shew that there had been a compliance by the appellant at the time of such sale with the provisions of s. 14 of the Sale of Food and Drugs Act, 1875, the right to proceed being limited by s. 20 of that Act to the person causing an analysis to be made; that the course pursued in the proceedings had the effect of rendering it impossible for the respondents to raise the contention which they would otherwise have desired to raise, that the article sold by them was in fact pure butter, and the attention of the justices was drawn to the case of *Smart & Son* v. *Watts* (1); (2.) That the certificate of the public analyst was not evidence as against the respondents, as no part of the sample of the article sold to the appellant and subsequently analyzed had been offered or delivered to them.

On the part of the appellant it was contended—(1.) that Longstreeth not having purchased the article in question with the intention of submitting it to analysis, s. 14 of the Sale of Food and Drugs Act, 1875, did not apply, and the attention of the justices was called to *Buckler* v. *Wilson* (2), and that the appellant was entitled to prosecute. It was also contended that under the circumstances the certificate of the analyst was made

(1) [1895] 1 Q. B. 219. (2) [1896] 1 Q. B. 83.

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evidence against the respondents by s. 21 of the Sale of Food and Drugs Act, 1875.

The justices were of opinion that the certificate of the public analyst could not be given in evidence against the respondents, and dismissed the summons, but stated the present case, in which the question for the opinion of the Court was whether they were right in their decision.

L. M. Richards (*J. C. Earle*, with him), for the appellant. The proceedings were properly initiated by the appellant, for as the Margarine Act, 1887, deals with criminal offences, any person is entitled to prosecute. The substantial question is whether it is a condition precedent to a prosecution under s. 6 of the Margarine Act that there should be an analysis of the article purchased in the same form as is prescribed in the Sale of Food and Drugs Act, 1875. Sect. 12 of the Margarine Act provides that all proceedings under it, save as expressly varied, are to be the same as prescribed by ss. 12–28 of the Sale of Food and Drugs Act, 1875, and s. 14 of the latter Act prescribes how a sample is to be taken for purpose of analysis. Sect. 14, however, only applies to a purchase for the purpose of analysis: *Buckler* v. *Wilson* (1); and the purchase by Longstreeth from the respondents was not for the purpose of analysis, but was a purchase made in the ordinary course of business for resale.

[BIGHAM J. The only question is whether the certificate was evidence against the respondents that the article sold by them was margarine.]

Sect. 21 of the Act of 1875 makes the certificate "sufficient evidence of the facts therein stated," and this certificate was admissible in evidence against the respondents for that purpose.

Bonsey, for the respondent, was not called upon to argue.

RIDLEY J. I am clearly of opinion that this appeal must be dismissed. The question for our decision arises thus. Proceedings were taken against Longstreeth under s. 6 of the Sale of Food and Drugs Act, 1875, and s. 6 of the Margarine Act, 1887; at the hearing he escaped conviction under the former Act because he was able to shew under s. 25 that he had

(1) [1896] 1 Q. B. 83.

purchased the article with a written warranty, and had sold it in the same state as when he purchased it, which is a sufficient defence to a charge under that Act; the charge under the Act of 1887 was then abandoned. An information was then laid against the respondents, the wholesale firm from whom Longstreeth had purchased the article, and a summons under s. 6 of the Margarine Act issued against them in the ordinary course. In the course of the hearing the same certificate of the analyst which had been used in the prosecution of Longstreeth was tendered as evidence that the article sold by the respondents was margarine, but it was rejected. Unless something can be found in the Act of Parliament which enables a document which is evidence as between certain persons to be evidence against everybody, there was no evidence against the respondents upon which they could possibly be convicted, for there was no evidence that the article sold by them was margarine. I can see nothing in the Act which makes the analyst's certificate evidence against third parties, and I cannot extend the provisions of s. 21 of the Act of 1875, which would apply to the proceedings against Longstreeth, by saying that third parties are bound by that document. The appellant has relied upon the case of *Buckler* v. *Wilson* (1), but that decision proceeded upon entirely different grounds: evidence was in that case properly given to shew that the article purchased was margarine, and nothing that we are now saying in any way interferes with that decision. I must not be understood as implying that there is no other method in such a case as the present of proving that the article sold was margarine than by the production of the certificate of the public analyst; on the contrary, it is clear from *Buckler* v. *Wilson* (1) that it would be open to the prosecution to prove that fact by any other proper means; but it was not sufficient to attempt to prove it by putting in a document which was not evidence. I give no decision upon the question raised before the justices whether the proceedings could be instituted by any person other than the purchaser, as the point has not been really argued before us.

(1) [1896] 1 Q. B. 83.

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BIGHAM J. I am of the same opinion. The only question is whether there was any evidence before the justices that the article purchased by Longstreeth was margarine. The only evidence offered of that fact was the certificate of the public analyst which had been procured for the purpose of the prosecution of Longstreeth, who, it was alleged, had sold part of the same article as butter. By s. 21 of the Sale of Food and Drugs Act, 1875, the certificate of the result of the analysis which is made under these circumstances is made admissible as primâ facie evidence of its contents upon the prosecution of a person in the position of Longstreeth, but it is not made evidence against any other person whomsoever. When the respondents were in their turn prosecuted, the certificate was tendered in evidence in order to shew that the article sold was margarine, and the justices upheld an objection that the certificate was not evidence. I entirely agree with them that it was not evidence against the respondents, who were entitled to require strict proof that the article sold was margarine: to produce a document made with reference to another case by a gentleman who is not called as a witness, and to say that it is evidence against these respondents, is absolutely contrary to the law of evidence.

In my judgment the case of *Buckler* v. *Wilson* (1) has no application to the present case. It is true that in both cases the prosecution was under the same section of the same statute, the Margarine Act, 1887; but in that case an analysis had been made for the purpose of the case, and the certificate of the result of the analysis was tendered in evidence and admitted without objection. It is true that in that case the objection was taken that it was a condition precedent to a prosecution under the Act that the provisions of s. 14 of the Act of 1875 as to the taking of a sample for analysis should be complied with; but the objection was held to be bad as the article had not been purchased for analysis. Subject to that objection, it was admitted by the person against whom the proceedings were taken that the article sold to the guardians was margarine; in the present case the respondents required

(1) [1896] 1 Q. B. 83.

the prosecution to prove the same fact by proper evidence; this they did not do, and the appeal fails. The justices were right in their decision, and the appeal must be dismissed. I refrain from expressing any opinion on the point whether the proceedings were taken by the proper person as prosecutor.

Appeal dismissed.

Solicitor for appellant: *Sir Richard Nicholson.*
Solicitors for respondents: *Neve & Beck.*

W. J. B.

MASON *v.* COWDARY.

Adulteration—Sample—Purchase for Analysis—Mode of dividing Sample—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.

Where a purchase is made of several articles of food or drugs at the same time for the purpose of analysis, each article purchased must be divided into three parts, and otherwise dealt with as required by s. 14 of the Sale of Food and Drugs Act, 1875. Where a purchase is made of six bottles of the same article of food or drug, each bottle is for the purposes of the Act a separate article, and it is therefore not a sufficient compliance with the requirements of s. 14 for the purchaser to divide them into three lots of two bottles each without opening any of the bottles, and to hand one lot to the analyst, one to the seller, and to retain one himself.

CASE stated by justices of the county of Bedford.

The respondent had been summoned to answer an information laid by the appellant under s. 6 of the Sale of Food and Drugs Act, 1875, charging her with selling to the appellant, and to his prejudice, a certain drug, to wit, camphorated oil, which was not of the nature, substance, and quality demanded.

At the hearing it appeared that the respondent kept a small general shop, and that on November 16, 1899, the appellant, an inspector appointed by the Bedfordshire County Council, purchased from her six twopenny bottles of camphorated oil. The oil was exposed for sale in bottles which were apparently not prepared by the respondent, but each of which bore a label with the name of a chemist in a neighbouring town upon it. There was no evidence whether or not the bottles were

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identical in character or appearance, or whether or not the labels on all the six bottles bore the name of the same chemist. The six bottles were all purchased at the same time. At the time of the purchase, and after it was completed, the appellant (having duly notified to the respondent his intention to have the oil analyzed by the public analyst) divided the six bottles into three lots of two bottles each, sealing each separate lot of two bottles in a separate bag. The appellant then handed one of the sealed bags to the respondent, taking away the other two sealed bags with him, one of which he subsequently forwarded for analysis, and the remaining one he retained. The appellant did not open any or either of the bottles of camphorated oil or mix or divide their contents, but the two bottles in the sealed bag handed to the respondent were in exactly the same state as when purchased. The public analyst's certificate of the analysis of the contents of the two bottles forwarded to him shewed that the camphorated oil in those bottles contained 17½ per cent. of camphor, whereas it should have contained 20 per cent.

The appellant contended that the requirements of s. 14 of the Sale of Food and Drugs Act, 1875, had been complied with by him, inasmuch as he had divided the article into three parts to be then and there separated, and each part was marked and sealed or fastened up in such manner as its nature would permit; and that he had delivered one of the parts to the seller, i.e., to the respondent.

The justices were of opinion that the appellant had not complied with the requirements of s. 14, and were not satisfied that the contents of the two bottles analyzed by the public analyst were identical in nature and substance with the other two sets of bottles in the hands of the seller and the appellant respectively.

The question for the opinion of the Court was whether the division of six bottles of camphorated oil by the appellant as described was a sufficient compliance with the terms of s. 14 of the Sale of Food and Drugs Act, 1875. (1)

(1) By s. 14 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), "The person purchasing any article with the intention of sub-

Bonsey, for the appellant. The sample was divided into three parts in such a way as to satisfy the requirements of s. 14 of the Act of 1875; it was the only practical way of dividing it. The appellant could not properly have divided only a single bottle. The objection to such a course would be that the single bottle was not the article which he purchased; and, further, each bottle was so small that it did not by itself contain a sufficient quantity for a fair analysis. Nor would it be reasonable to require him to open all the bottles and mix the contents and divide the mixture: that would be open to the objection that many drugs are volatile and evaporate when the bottle is opened. Besides, there might be a sediment at the bottom of the bottle which the ordinary purchaser could not get out. Such a mode of dividing the sample would require the care of a chemist, and could not be properly carried out by an ordinary purchaser. Seidlitz powders, which are frequently sold in boxes, should contain a given weight of the ingredients in each powder; but it would be impossible to ascertain this if the powders were mixed together by a purchaser for the purpose of analysis. In such cases the only practical mode of division is that adopted by the appellant in the present case.

R. D. Muir, for the respondent, was not called upon.

DARLING J. I am clearly of opinion that this appeal must be dismissed. The question arises on s. 14 of the Sale of Food and Drugs Act, 1875, which deals in very precise and definite language with what has to be done by a person who purchases

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mitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analyzed by the public analyst, and shall [offer to] divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, [proceed accordingly, and shall] deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison and submit the third part, if he deems it right to have the article analyzed, to the analyst."

By s. 13 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), the words above printed in brackets are repealed.

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Darling J.

an article for purposes of analysis by a public analyst, and requires him to divide the article into three parts, to be then and there separated, and afterwards to deal with the three parts in the manner directed in the section. The case shews that the appellant, an inspector under the Act, went to the respondent's shop and purchased six twopenny bottles of camphorated oil; that he divided them into three lots of two bottles, sealing each lot in a separate bag, and handing one of the bags to the respondent and taking away the others, one for the public analyst and one for retention by himself. He did not open any of the bottles or mix or divide their contents. I cannot think that such a manner of dealing with the bottles purchased was a compliance with the requirements of the section. If the appellant had bought one bottle only, he would have bought one article. It does not matter that it is a small article; it would be precisely the same whether it were a magnum or a twopenny bottle. Six bottles are six articles, and those are required to be divided into three parts; here not one of the six articles was divided at all. In my judgment the appellant bought six articles and did not divide any of them. As he did not divide any of the bottles, and each was an article, he did not act in the way prescribed by the section.

BIGHAM J. I agree.

Appeal dismissed.

Solicitors for appellant: *F. Venn & Co., for W. W. Marks, Bedford.*

Solicitors for respondent: *Wetherfield, Son & Baines.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
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June 25.

BARNETT, Appellant *v.* CORPORATION OF ECCLES, Respondents.

Local Government—Damage by reason of Exercise of Powers of Act—Costs of Legal Proceedings—"Full Compensation"—Extra Costs—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 308.

"Full compensation" for damage sustained by reason of the exercise of any of the powers of the Act under s. 308 of the Public Health Act, 1875, does not include extra costs of legal proceedings which have been incurred, over and above the taxed party and party costs, by a person against whom the local authority has unsuccessfully proceeded under the Act.

Proceedings having been taken under ss. 94–96 of the Public Health Act, 1875, by the respondents, a local authority, against the appellant in respect of a nuisance, an order to abate the nuisance was made against the appellant by the justices. He appealed against the order to quarter sessions, who dismissed the appeal, subject to a case. On the hearing of the case a Divisional Court ordered that the order of quarter sessions should be quashed with costs, and that the respondents should pay to the appellant his costs of the appeal to the High Court to be taxed. The costs of the two appeals were taxed and paid to the appellant. In prosecuting the appeals the appellant reasonably incurred costs to a greater amount than the taxed costs which he received, and he claimed from the respondents the difference between the taxed costs and the amount so expended by him, as compensation under s. 308 of the Public Health Act, 1875:—

Held (affirming the decision of a Divisional Court), that he was not entitled to recover the amount so claimed by him.

Appeal from the judgment of a Divisional Court (Bigham and Phillimore JJ.) upon a special case stated by an arbitrator acting under the Public Health Act, 1875, s. 308.

The facts are fully set out in the report of the case in the Court below (1), and for the purposes of this report may be briefly stated as follows. The appellant was the owner of certain cottages in the borough of Eccles. The respondents, who were the local authority of the borough, caused a notice to be served upon him under s. 94 of the Public Health Act, 1875,

(1) Ante, p. 104.

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requiring him to abate a nuisance on his premises, and for that purpose to do certain specified works. The notice not having been complied with, the respondents laid a complaint against the appellant under s. 95 of the Public Health Act, 1875. Upon the hearing of the complaint, justices in petty sessions made an order requiring the appellant to comply with the requisitions of the notice. The appellant appealed to quarter sessions, who dismissed the appeal, subject to a case. Upon the hearing of the special case a Divisional Court ordered that the order of the quarter sessions dismissing the appeal against the order of the justices should be quashed, and instead thereof judgment should be entered for the appellant that the said order of the justices be quashed, with costs; and it was further ordered by the Divisional Court that the respondents should pay to the appellant his costs of the appeal to the High Court to be taxed by the master of the Crown Office. The appellant's costs of the two appeals were taxed, and the amounts allowed on taxation paid by the respondents to the appellant. The appellant claimed the amount of expenses incurred by him in the two appeals respectively over and above the amount of the taxed costs which he had received, under s. 308 of the Public Health Act, 1875, as compensation for damages sustained by him by reason of the exercise of the powers of the Act in relation to a matter as to which he was not himself in default, and his claim was referred to arbitration under that section. The arbitrator found that the expenses so incurred by the appellant in relation to the appeals were reasonably and properly incurred.

The question for the Court was in substance whether the appellant was entitled to recover the amount of those expenses as compensation under s. 308 of the Public Health Act, 1875. (1)

(1) With regard to the question raised by the special case (see ante, p. 104) as to the costs incurred by the appellant in defending himself before the justices in petty sessions, it is desirable to make the following explanation. A considerable amount of discussion and conflict of views took place on the argument in the Court of Appeal with regard to the effect of what occurred on the hearing in the Court below as to these costs. Ques-

The Divisional Court held that he was not. (1)

Marshall, Q.C., and *Clarke Hall*, for the appellant. The appellant is entitled to recover under s. 308 of the Public

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tions were raised as to whether by the order of the Divisional Court, which quashed the order of the quarter sessions, it was intended to give the appellant these costs; whether, if so, the Divisional Court had any jurisdiction to deal with these costs; and whether there existed any machinery by which they could be taxed. It was stated by the respondents' counsel that in the Court below he had offered to agree on behalf of his clients that the appellant's costs before petty sessions should be taxed by some officer of the Court, and that his clients would take no objection to the taxation, and would pay to the appellant the amount thereon allowed, thus leaving, as the sole point for the decision of the Court below in regard to all three heads of costs, the question whether anything beyond party and party costs could be recovered by the appellant under s. 308 of the Public Health Act, 1875; and that this suggestion was understood to be acquiesced in on the part of the appellant, and acted on by the Court. The counsel for the appellant said that this was a misunderstanding, and that he had never intended to consent or consented to such an arrangement, his contention being that, in the absence of any possibility of taxing these costs, they stood on a different footing from the costs before quarter sessions and in the Divisional Court, and the appellant, on the authority of *Walshaw* v. *Brighouse Corporation*, [1899] 2 Q. B. 286, was entitled to recover the full costs incurred by him under s. 308. The formal judgment of the Court below as drawn up was that, in answer to the questions submitted to them, the Court were of opinion that the appellant was not entitled to recover more than his taxed costs of the proceedings before petty sessions, quarter sessions, and the Divisional Court. The Court of Appeal held that, having regard to what took place in the Court below, and the terms of their judgment, it was clear that that Court supposed that there was some such understanding as stated by the respondents' counsel, and that under the circumstances it must be taken that such was the case, and the appeal must be dealt with accordingly. They therefore dealt with the case on that footing, and decided it as regards the appellant's costs at petty sessions as depending on the same point of law as that involved with regard to the appellant's costs before quarter sessions and in the Divisional Court, namely, whether extra costs could be recovered under s. 308. The appellant's contention concerning the costs at petty sessions involved questions with regard to the meaning of the order of the Divisional Court and the effect of somewhat intricate legislation; and, as the Court of Appeal in the end did not decide any such question, it has not been thought desirable to encumber this report with matter immaterial to the point of law really decided; and therefore all reference to the facts and the arguments and parts of the judgments relating to the costs at petty sessions has been omitted in the body of the report.

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Health Act, 1875, the difference between the amount of the costs which he reasonably incurred in the appeals to quarter sessions and the Divisional Court and the amount of the taxed costs which he has received. "Full compensation" in the section means a reimbursement for all the expenses to which the person sustaining the damage has been put by reason of the exercise of the powers of the Act: see *Walshaw* v. *Brighouse Corporation* (1); *In re Bater and Birkenhead Corporation.* (2) The fact that the appellant has recovered under an order of the Court part of those expenses cannot deprive him of his right to full compensation under s. 308. That section has made the arbitrator, and not the Divisional Court which awarded the taxed costs, or the taxing master, the tribunal to determine what is "full compensation." The case is similar to that of an action on a contract of indemnity, where the plaintiff, who has defended an action, can recover on the contract his extra costs of defending the action: *Smith* v. *Compton* (3); *Howard* v. *Lovegrove.* (4)

Danckwerts, Q.C., for the respondents. Sect. 308 of the Public Health Act, 1875, gives full compensation where any person sustains any "damage" by reason of the exercise of any of the powers of the Act in relation to a matter as to which he is not himself in default. Under the Lands Clauses Act, 1845, it has been decided that a claim for compensation for damage caused by the exercise of statutory powers can only be made where the injury would have been actionable at common law if the act complained of had not been authorized by the statute: *Ricket* v. *Metropolitan Ry. Co.* (5) The same rule of law was laid down under the Waterworks Clauses Act, 1847, in *New River Co.* v. *Johnson* (6), and under a private drainage Act in *Rhodes* v. *Airedale Drainage Commissioners* (7); and in *Hall* v. *Bristol Corporation* (8) it was held upon a section of the Public Health Act, 1848, similar to s. 308 of the Public Health

(1) [1899] 2 Q. B. 286.
(2) [1893] 1 Q. B. 679; 2 Q. B. 77.
(3) (1832) 3 B. & Ad. 407; 37 R. R. 387.
(4) (1870) L. R. 6 Ex. 43.
(5) (1867) L. R. 2 H. L. 175.
(6) (1860) 2 E. & E. 435.
(7) (1876) 1 C. P. D. 402.
(8) (1867) L. R. 2 C. P. 322.

Act, 1875, that the "damage" for which full compensation was payable must be actionable damage. Applying that principle to the present case, all the "damage" that the appellant has suffered is the party and party costs which he has incurred in consequence of the respondents' proceedings. By the general law the difference between solicitor and client and party and party costs is not "damage" recoverable. The law recognizes no such damage; it considers the taxed party and party costs as sufficient compensation for the damage caused by the exercise of the statutory powers. Sect. 308 is a general section applying to the exercise of any of the powers of the Act. Under s. 107 the local authority may, instead of taking summary proceedings before justices, bring an action in the High Court to enforce the abatement of a nuisance. Could it be said that, if the local authority failed in the action and had to pay costs, the defendant could in addition recover the difference between those costs and solicitor and client costs under s. 308? In *In re Bater and Birkenhead Corporation* (1) there were no judicial proceedings in which costs could be awarded and taxed. In the present case there were.

Marshall, Q.C., in reply.

A. L. SMITH L.J. The real question raised in this case between the parties with regard to all the matters in dispute is whether under the words "full compensation" in s. 308 of the Public Health Act, 1875, the appellant is entitled to recover what the law does not allow as well as that which it does allow, that is the difference between his taxed costs of the proceedings in question, which the law allows, and the amount of the expenses actually incurred by him in those proceedings, which it does not allow. The Court below held that he was not so entitled; that he was entitled only to the compensation which the law gives him in respect of costs, namely, the taxed costs recoverable as between party and party. I am of opinion that their decision was clearly right, and that, the question really raised in this case and decided by the Court below being what I have before stated, the case is entirely clear of

(1) [1893] 2 Q. B. 77.

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anything decided in the cases of *Walshaw* v. *Brighouse Corporation* (1) and *In re Bater and Birkenhead Corporation.* (2) I think the appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I agree. The real point which the appellant sought to establish in regard to all the matters in dispute is that he is entitled under the words "full compensation" in s. 308 of the Public Health Act, 1875, to recover as part of that compensation the costs actually incurred by him in the proceedings in question over and above his taxed costs of those proceedings which he has received. The Divisional Court decided that he was not so entitled. I am of opinion that their decision was perfectly right. I think that it would be a great pity if in this case we were to allow a departure from that which has been for a great length of time a well-settled principle of law, namely, that, where there has once been an assessment of the costs of proceedings by means of taxation, no further amount can be recovered in respect of the costs of those proceedings except in the case of some contract or statute which gives an absolute indemnity.

ROMER L.J. concurred.

Appeal dismissed.

Solicitors for appellant: *Chester & Co., for Marriott & Co., Manchester.*

Solicitors for respondents: *Ridsdale & Son, for G. W. Bailey, Town Clerk of Eccles.*

(1) [1899] 2 Q. B. 286. (2) [1893] 2 Q. B. 77.

E. L.

[IN THE COURT OF APPEAL.]

C. A.

1900

April 27; *May* 4.

In re A. B. & CO. (No. 2).

Bankruptcy—Petition—Official Receiver—Interim Receiver—Special Manager—Jurisdiction—Dismissal of Petition—Order appointing Interim Receiver, Validity of—Business of alleged Debtor carried on by Special Manager—Accounts—Remuneration and Expenses of Special Manager—Charge on Profits—Just Allowances—Officers of the Court, Protection of—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 10, 12—*Bankruptcy Rules*, 1886, *rr.* 170–175.

Where, during the pendency of a bankruptcy petition which is ultimately dismissed without any receiving order having been made upon it, the official receiver, on being appointed interim receiver under s. 10 of the Bankruptcy Act, 1883, appoints, in exercise of his power under s. 12 (W. N. (1900) p. 12), a special manager of the alleged debtor's business, the special manager is entitled to be reimbursed out of his receipts from the business his expenses, including remuneration, properly incurred by him in carrying it on until the dismissal of the petition.

The fact that the special manager has, under such circumstances, been in possession of and carrying on the business does not entitle the alleged debtor, on the petition being dismissed, to treat him as a wrong-doer or to deprive him of his right to protection as an officer of the Court; for, as the Bankruptcy Court has jurisdiction to entertain a petition against an alleged debtor, an order appointing the official receiver as interim receiver during the pendency of the petition, with the consequent right of appointing a special manager under s. 12, continues valid until it is set aside, and thus imparts validity to everything done under it, even though it may turn out to have been erroneously made—as where, at the hearing of the petition, it appears that the alleged debtor, being a foreigner not subject to the jurisdiction of the Bankruptcy Court, is not a "debtor" within the meaning of the Act ([1900] 1 Q. B. 541), and, therefore, not subject to the provisions for the appointment of an interim receiver or a special manager.

Per Rigby L.J. The power of the Bankruptcy Court to appoint the official receiver to be interim receiver under s. 10 of the Act arises immediately upon the presentation of the petition, whatever the result of the petition may be.

The special provisions of rules 170–175 (Bankruptcy Rules, 1886) relating to the appointment of the official receiver as "interim receiver," and providing for the deposit in advance of a sum for his expenses, do not deprive him of his subsequent right to reimbursement out of his receipts of all expenses incurred by him in carrying out the duties of his office.

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Those rules apply exclusively to an interim receiver, and not to a special manager at all.

The principles on which accounts should be taken of the proceeds of a business carried on on behalf of the owner, considered.

A. B. & Co. were an American partnership firm of American citizens carrying on business as drug manufacturers in Baltimore, U.S., and also in London, Paris, and elsewhere in Europe.

On January 18, 1900, certain English creditors of the firm presented a bankruptcy petition against it, and on the same day, upon the application of the petitioning creditors, the official receiver was appointed, under s. 10 of the Bankruptcy Act, 1883, interim receiver of the firm's property, with a view to preserving the business as a going concern.

On the following day the official receiver, on the application of the petitioning creditors, appointed a special manager of the firm's London business, under s. 12 of the Bankruptcy Act, 1883, to act pending the proceedings on the petition, the Court of Appeal having, upon an ex parte motion by the petitioning creditors, expressed the opinion that the official receiver had power to appoint a special manager under the section notwithstanding that he was acting as interim receiver under s. 10: see W. N. (1900) p. 12. Under the terms of his appointment, which was in writing, the special manager was to receive a remuneration of ten guineas a week, and he was directed to keep the business as a going concern, to purchase such goods as were necessary for the continued conduct of the business and the completion of orders on hand, to keep the books, employ workmen and pay their wages; to hand over all moneys coming to his hands weekly to the official receiver, accompanied by a written statement of the same; any moneys required by the special manager for current expenditure and disbursements to be paid out of moneys provided by the official receiver from time to time, not exceeding the amount so paid in by the special manager as aforesaid, and available for such purpose. The special manager thereupon took possession of the firm's premises, proceeded to conduct the business, effected sales, got in moneys, and incurred expenses and liabilities.

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On February 23, 1900, the petition came on for hearing before the Registrar in Bankruptcy, who dismissed it on the ground of want of jurisdiction, the members of the firm being foreigners and not being "debtors" within the meaning of the Bankruptcy Act, 1883; but the interim receiver was continued pending an appeal.

On the 28th the appeal was heard, and was dismissed with costs (1), and the order appointing the official receiver as interim receiver was discharged. On the same day (the 28th) the official receiver discharged the special manager, who forthwith gave up possession of the firm's premises to the firm. The firm then commenced proceedings under rule 175 of the Bankruptcy Rules, 1886, to recover damages alleged by them to have arisen out of the appointment of the interim receiver, and these proceedings were still pending.

From the accounts rendered by the special manager to the official receiver, it appeared that the former had received during the time he had been in office, that is, from January 19 to February 28, very considerable sums, which he duly paid over to the official receiver, who thereout repaid him various sums for disbursements, and also paid him his remuneration. On February 28 the official receiver had in his hands a balance of 409*l.*, but there was then owing to the special manager, as he alleged, a sum of 814*l.* due in respect of disbursements, remuneration, and liabilities for advertising. The special manager claimed that he should be recouped, as to part of this sum, by payment to him of the 409*l.*, and, as to the remainder, out of the book debts of the firm attributable to sales by him. The official receiver then applied to the registrar for directions as to how he should deal with the 409*l.* in his hands, and also with regard to the amounts of orders given by the special manager and said to have been outstanding at the date of his discharge. The registrar considered that the special manager was in fact the nominee and agent of the petitioning creditors; that the directions given to him by the official receiver were intended to indemnify him, the special manager, in respect of anything done by him at the request of the petitioning creditors;

(1) [1900] 1 Q. B. 541.

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and that, if the official receiver required further funds to meet expenses incurred by him as interim receiver, he should have obtained from the petitioning creditors a sufficient deposit under rule 172 of the Bankruptcy Rules, 1886. The registrar accordingly held that the 409*l.* must be regarded simply as a portion of the property of the going concern belonging to the firm, and made an order directing the official receiver to hand it over to the firm, less certain official fees.

From that order the special manager, and also the petitioning creditors, appealed, the notice of appeal also asking that it might be referred to the registrar to take an account (1.) of the moneys received by the special manager while carrying on the company's business; (2.) of the amount of moneys properly paid and disbursed, and liabilities properly incurred, by him while carrying on the business; and (3.) of the amount of book debts of the business attributable to sales made by him of goods bought by him, and outstanding at the date on which the interim receiver order was discharged; and that the 409*l.*, or so much thereof as the Court should think just, should be applied in reimbursing the special manager his payments, disbursements, and liabilities properly made or incurred, and that all necessary directions should be given for indemnifying him out of the company's assets for the expenses incurred in preserving the estate.

Muir Mackenzie, for the appellants, the special manager, and the petitioning creditors. The money paid over by the special manager to the official receiver and now in the latter's hands is subject, first of all, to reimbursing the special manager the payments he has made. The official receiver is an officer of the Court, and can give the special manager employed by him directions as to his duties and powers. The money received by the special manager is received by him in carrying on the business under the order of the Court and under a statutory obligation; he is therefore entitled to reimburse himself the expenses he has thereby incurred; and the money in the official receiver's hands, received from the special manager, and which the official receiver might, if acting as manager himself,

have expended in reimbursing himself, ought first to be applied in payment of the proper expenses of his servant, the special manager. The learned registrar took the view that the special manager was the agent of the petitioning creditors; but that, it is submitted, was wrong. The provisions for making a receiving order for the protection of the debtor's estate are contained in ss. 5 to 9 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). Then s. 10 provides (sub-s. 1) that the Court may, at any time after presentation of the petition and before a receiving order is made, appoint the official receiver to be interim receiver of the property "of the debtor," and direct him to take immediate possession thereof; and (sub-s. 2) that the Court may, at any time after presentation of the petition, stay any action, execution or other legal process against the property or person of the debtor. And s. 12 empowers the official receiver to appoint a special manager of the "debtor's" estate or business until a trustee is appointed. The official receiver having in the present case been appointed interim receiver, and he having appointed a special manager, the question is whether the special manager, who has, in carrying on the business under the official receiver's directions, paid considerable sums out of pocket, is to suffer merely because no receiving order has been made. Taking ss. 10 and 12 together, when the official receiver has been put in office as interim receiver by an order made, the Court having jurisdiction to make it, the powers of the special manager follow from that, those powers being the same the official receiver would have had if acting himself. The official receiver and the special manager are equally officers of the Court, and therefore neither of them can be said to be a trespasser as having been wrongfully in possession of the alleged debtor's property. The acts of a receiver appointed by the Court are the acts of the Court itself, and therefore, even if there has been a diminution of profits during the carrying on of the business by him, that fact does not enable the owner of the business to claim relief on the ground that the business would have been more profitably carried on by the owner: *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.* (1); Mayne on

(1) [1892] A. C. 166, 195.

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Damages, 6th ed. p. 421. The special manager has done nothing he was not entitled to do as special manager and as an officer of the Court, and therefore he is entitled to have expenditure incurred by him as an officer of the Court reimbursed out of the moneys he has received. Even treating him as the petitioning creditors' agent, the debtors cannot take the benefit of the trading and of the preservation of the business by that agent without allowing him the proper expenditure: *Ex parte Vaughan.* (1) On principle, if you employ an agent in carrying on a trade, you allow him the expenses properly incurred, just as in the case of executors carrying on a business: *Dowse* v. *Gorton.* (2) The right of the official receiver or his agent to reimbursement is recognised by the Bankruptcy Rules, 1886, rr. 172 and 173. Accordingly, when in the present case the agent of the official receiver gives up possession, the debtors, in resuming possession of their property, cannot take advantage of his acts in preserving and carrying on the business as a going concern without allowing him the expenditure he has incurred, and which they themselves would have incurred if they had carried on the business. [He also referred to *Whitmore* v. *Black.* (3)]

C. A. Russell, Q.C., and *Carrington*, for the respondents, the alleged debtors. The petition having been dismissed as the respondent firm was not subject to the English bankruptcy law at all, it follows that everything that has been done under it is wrong, and the respondents have therefore commenced proceedings, under rule 175, to recover damages by reason of the appointment of an interim receiver. But in the meantime the official receiver is in possession of money which is the produce of their business. Pending the decision of the rights of the parties in the proceedings they have instituted, this money is, they contend, their property. It is just the same as if it had been in the till at the time they came back to the business from which they had been wrongfully ousted. Primâ facie the business is theirs and the money is theirs, though they may not be liable to account for it: at all events they are entitled

(1) (1884) 14 Q. B. D. 25. (2) [1891] A. C. 190, 203.
(3) (1844) 13 M. & W. 507.

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to receive it. The effect of the dismissal of the petition and the setting aside of the order appointing an interim receiver was that the respondents were restored fully to their position as the persons entitled to the business. Rule 175 shews that, for the purpose of adjusting matters when the order for an interim receiver has been set aside, the adjustment must be as between the wrongfully alleged debtor and the petitioning creditor. So that the petitioning creditors here are doubly responsible—first, to the special manager, and, secondly, to the respondents. Neither the official receiver nor the special manager is entitled to go into the business except at his own risk: if they do, they must protect themselves, and if they have failed to do so they must recover from the petitioning creditor, and not from the owner of the business. Rule 172 says that before any order is made under rules 170 and 171 appointing the official receiver as interim receiver, the person who made the application therefor shall deposit with the official receiver 5*l.* towards the prescribed fee for the official receiver, and such further sum as the Court shall direct for the expenses which may be incurred by him. The scheme of the Act and rules is that the whole expense of carrying on the work of the official receiver or special manager is to be provided by the petitioning creditor, and it is to the fund so provided that those officers are to look for their remuneration. If they are to be treated as officers of the Court they must look solely to the machinery provided by the Act for their indemnity. They have no right to expend a single penny until the petitioning creditor has deposited his money under the rule; and if they choose to do so before that is done, neither of them can claim reimbursement as an officer of the Court: he has chosen to rush into the expenditure without seeing that the indemnity required by the Act and rules has been provided. Having wrongly departed from the rules and paid money out of his own pocket, the special manager here must apply to the petitioning creditors; he has no claim against the respondents nor any lien on the assets.

[LINDLEY M.R. Rules 343 and 344 deal expressly with the special manager, his remuneration, and his rendering of accounts to the official receiver. Rules 170 to 175 are headed "Interim receiver." Do you say those rules apply to a special manager

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who is the subject of the special provisions in rules 343 and 344?]

No authority on the point can be found. The petitioning creditors here are taking a wrong position: they are trying to force the respondents, on the authority of *Ex parte Vaughan* (1), to treat the special manager as their agent, but they decline so to treat him.

[RIGBY L.J. He is put in by the Court.]

But at the instance of the petitioning creditors. The special manager was a trespasser: he was turned out because the business belonged to the respondents: he ought never to have been in possession at all. The question of the possession of the official receiver or special manager being the possession of the Court does not arise here, for the business is their business, and the money arising from it is their money, and to deprive them of any part of it would be robbery. The expenditure by the special manager not having been made at their request, he cannot claim repayment by them or out of their money: Leake on Contracts, 3rd ed. p. 68.

Muir Mackenzie, in reply. Under s. 70 of the Bankruptcy Act, 1883, it is the duty of the official receiver to authorize the special manager to raise money or make advances for the purposes of the estate where necessary. The practice is that before the official receiver hands over the estate to the trustee he is to be repaid all costs, charges and advances: rule 318. And where the official receiver has carried on the business of the debtor and made payments out of pocket for that purpose, he is entitled to be reimbursed: *Re Taylor*. (2) To say that he should have asked beforehand for the money he requires for his expenditure does not advance the respondents' argument; for he is equally entitled to be repaid; it is a mere matter of account. The special manager is not the agent of the petitioning creditor: he is a person appointed by the official receiver under the Act, and therefore becomes an officer of the Court and acts as such just as if the official receiver had acted himself. There is thus no question of agency at all.

[LINDLEY M.R. The case is similar to that in which the Court has appointed a receiver, when it turns out that it had

(1) 14 Q. B. D. 25. (2) (1884) 51 L. T. (N.S.) 711.

no jurisdiction to appoint one. There the Court treats the receiver just as the common law treats a sheriff who is wrongfully in possession: there he is not treated as a trespasser.]

[*Carrington.* Special protection is by law given to the sheriff: the Court has jurisdiction to order the sheriff to take possession. Here the Bankruptcy Court had no jurisdiction to do anything in the matter, or to make an order of any kind.]

Lindley M.R. The question on this appeal is a little difficult and more than a little interesting. The real question is what order the Court ought to make, under circumstances which I will mention presently, respecting a sum of 409*l.* which is in the hands of the official receiver. That sum came into his hands in this way. A petition in bankruptcy was presented in the ordinary way against an American firm, the partners in which were resident abroad; and before any receiving order was made, the case being represented as one of urgency, the official receiver was appointed interim receiver under s. 10 of the Bankruptcy Act; and he, under the authority conferred upon him by s. 12, as construed by this Court, appointed a special manager to carry on the business for a time. The special manager did carry on the business accordingly for about a month or five weeks, and in the course of carrying it on he effected sales, got in moneys, and incurred expenses and liabilities in the ordinary way in which anybody else would have done in carrying on a business. When the petition came on to be heard it was dismissed upon the ground that the alleged debtors were not "debtors" within the true meaning of that expression in the Bankruptcy Act, and in that sense there was no jurisdiction to make a receiving order against them. Now, I say "in that sense," because it is quite obvious that the Bankruptcy Court was the Court which had jurisdiction to entertain bankruptcy petitions against alleged debtors; and what is called "an order made without jurisdiction" should, in my opinion, be termed an erroneous order rather than an order made without jurisdiction. The

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line which divides an erroneous order from an order made without jurisdiction is a very fine one, and I am not going to discuss it now: it is familiar to us all who have had any experience in prohibition and that class of cases. But when once you have the fact that the Court which has made the order is the Court that has jurisdiction over the subject-matter, and that all you can say is that it has made an erroneous order because the person against whom the petition was presented did not happen to be a "debtor" within the meaning of the Act, that seems to me error rather than want of jurisdiction. I do not myself attach much importance to that, because what I am going to say would apply whether that be the true view or not; but I wished to point out what, to my mind, is the right view.

Now what has happened is this. The petition being dismissed—whether because there was no jurisdiction to entertain it, or because the alleged debtors were not "debtors" owing the petitioners any money within the meaning of that expression in the Bankruptcy Act—the proceedings fell to the ground in this sense, that the official receiver had no longer any authority to carry on this business nor the special manager either. But it does not follow that all they have done is to be treated as if there had been no order sanctioning what they have done. For example, as between them and the Court, they must pass their accounts; they cannot say, "We have nothing to do with the matter: the order was made without jurisdiction, and we are not going to account to the Court or anybody else for what we have received or paid." They cannot do anything of that sort. They must account in the ordinary way. They must pass accounts such as are usually passed by receivers; they must account for what they have received and for what they have paid; and they must bring into that account whatever allowances are regarded as just allowances on similar occasions.

The official receiver having asked the Court what he is to do with this money in his hands, the question arises, What is this money? It is money which has been paid over to him by the special manager without first deducting from it those expenses

which on passing the account he would have a right to deduct. In other words, this sum which the official receiver has got in his hands represents the gross receipts from the business, not the balance at all. Now the learned registrar has said he must treat the order appointing the official receiver as interim receiver as having been made without jurisdiction, and that he must therefore make an order on the official receiver to pay over this money which he has got in his hands to the alleged debtors as if it were theirs, without any account being taken of any deductions which under ordinary circumstances would have to be made. That appears to me to be wrong in principle. Just see what the result would be. Mr. Carrington says we are robbing his clients if we allow any deduction to be made; but it strikes me that if we did not allow any deduction to be made we should be robbing our own officer and treating him in a way which cannot be just. But what is the contention after all? What is the duty of any person appointed to carry on a business on the footing on which the receiver was appointed to carry it on? He must account for his receipts and expenditure and pay over the balance. He is not to pay over and part with finally all his receipts without taking into account what it has cost him to get in those receipts. It would be grossly unjust to require him to do otherwise; and even if the order appointing the official receiver, and the subsequent appointment by the official receiver of a special manager, were without jurisdiction in the proper sense, which I do not think they were—even if that were so, the Court would not allow its officer to be thrown over and to pay more than the balance which, on taking the account, would be found to be really due from him. It would be the duty of the Court to see that its officer was not unfairly dealt with; and no injustice whatever would be done to anybody by directing payment of the balance only, because no one could obtain payment of the amount claimed except on the terms of making just allowances. To hold the contrary would be grossly unjust, and therefore it appears to me that the order which has been made by the learned registrar is wrong in principle and contrary to precedent. None of us ever heard

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of such an order made by the Court on discharging its own officer and giving directions in respect of moneys which he had received in the discharge of his office.

Mr. Russell addressed to us an argument based upon the machinery provided by the rules, and it was to this effect: he wants us to say that the special manager ought to hand over this money to his client and look for his indemnity to those who employ him, who are the petitioner's creditors; and he referred to rule 172 and other rules to induce us to come to that conclusion. The answer to that, I think, is this—that these rules which are grouped under the head of "Interim receiver" are not applicable to special managers at all. They are applicable only to interim receivers and matters connected with their appointment; but even if they could be regarded as extending to special managers, I could not accede to his argument. What any receiver has to account for to anybody is, assuming he has acted properly, the balance appearing on his accounts; and it appears to me that the contention based on the machinery provided by the Act and those rules cannot be supported. The machinery never has been worked in that way before, and I think that to adopt any such view would be extremely unjust to any receiver.

The principles on which we are acting in this case are those which are laid down and were acted upon by the House of Lords in the *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.* (1), and are also the principles now settled in the coal-mine cases, and laid down in *Livingstone* v. *Rawyards Coal Co.* (2)

Having disposed of the points raised in opposition to the appeal, I will turn to what it is the appellants want to substitute for the order which has been made by the registrar. The appellants ask by their notice of appeal that the order below may be discharged. That is right. Then they ask this: "That it may be referred to the registrar to take an account (1.) of the moneys received by the special manager while carrying on the debtors' business under the interim receiver's order." That is right. Then, (2.) "of the amount of moneys properly paid and disbursed, and liabilities properly incurred,

(1) [1892] A. C. 166. (2) (1880) 5 App. Cas. 25.

by the special manager while so carrying on such business." That is right. Then, (3.) "of the amount of the book debts of the said business attributable to sales made by the special manager of goods bought by him." That is right, when coupled with the addition, "and which were outstanding at the date on which the said interim receiving order was discharged." Then they ask that the said sum of 409*l.*, or so much thereof as the Court shall think just, may be applied in "reimbursing the special manager the amount of the said payments and disbursements and liabilities properly made or incurred." I think that is right.

Then, as regards the costs, I think the unsuccessful party must pay them both here and below.

RIGBY L.J. As to the general principles which are to govern this case, I agree entirely with the Master of the Rolls, and I do not think it is necessary to add anything on that point.

As to the special argument founded on rule 172 and the following rules, I wish to say a word or two. The official receiver was in this case appointed interim receiver, and I do not think it is open to any one to say that he was wrongly appointed in the sense that the Court ought to have said it had no jurisdiction. On the facts known by the Court at the time it had jurisdiction; and indeed, as I read the Act, it is intended that on presentation of a petition the power to appoint an interim receiver shall arise, whatever the result may be of that petition. It may turn out that the alleged debtor is no debtor at all, either because, as in this case, he was not within the jurisdiction, or because, for instance, the accounts between him and the petitioning creditor had been wrongly taken, and that money was due to him rather than from him; and other instances might be given in which the presentation of a petition may have been wrong in fact. Now here the special manager has been appointed by the official receiver acting as interim receiver, and if there was no excess of jurisdiction, and nothing wrong in the terms in which the appointment was settled, the special manager must, in my opinion, be accountable to the

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official receiver. The official receiver, to make himself perfectly safe and to secure himself against any injury, provided that the special manager should pay the whole of the moneys that he should receive over to him, the official receiver, week by week, and these moneys were in fact so paid. What further security against danger could any one require? I do not think that the directions to the special manager were in any way waived by the official receiver. Under those directions the moneys were paid over to the official receiver. They were the gross proceeds of the business from time to time. I do not see that the alleged debtors are entitled to say, "We have a right to those moneys as they stand." They say they have "primâ facie" a right. What is the use of a primâ facie right if it can be displaced? Possibly, if there were money in the receiver's hands and no one could say where it came from or anything about it, they would be right in saying, "Those moneys ought to be ours; they come from our business, and there is no case of their being due to any other person; therefore, pay them to us." But the case is plain here: the moneys in the hands of the official receiver are not in fact the profits of the business; they are not the produce of the business in their totality. They required to be earned, and the special manager earned them by making payments out of his own pocket in the first place, relying upon the official receiver fulfilling his engagement to pay him from time to time, as no doubt he would have done if the whole matter had not been brought to a close by the dismissal of the petition. He was bound to the special manager to repay him the amount of the disbursements, and therefore I think the special rules that have been referred to have no application at all, and the alleged debtors—the respondents to the petition—cannot say, "You have a way of making yourself secure, but you have not availed yourself of it; the intention of the Act is that you should make yourself safe by getting a deposit by way of security, and in no other way." I do not wish to throw any doubt whatever upon the duty or right of the Court, which, according to my understanding, has always been to assist and protect officers of the Court, such as the official receiver and the duly-appointed agents of that

official receiver. I am quite content to base my judgment on that duty and that right of the Court.

I do not intend to interfere with the right of the alleged debtors to apply under rule 175 for an inquiry as to damages. That is not affected in any way by the judgment on the present appeal. They have also a right to everything that can be shewn to be, in a correct sense, the produce of the dealings in the business; but the special manager is entitled to be repaid whatever is found due to him upon his accounts. I think the inquiries suggested are proper, and I have nothing more to add.

COLLINS L.J. It seems to me that the question in this case really turns wholly upon whether the alleged debtors are entitled to treat the special manager as a wrong-doer. I think if they were so entitled there would be a great deal to be said for the argument adduced on their behalf; but if they are not so entitled, then I think the appellants are entitled to the account in the form in which they claim it. It seems to me clear that the Court that made the order appointing the interim receiver had general jurisdiction over the subject-matter. As part of that jurisdiction it had to inquire into the facts, and in the first instance it had to deal with the case upon ex parte evidence; and it arrived at a decision which was ultimately found to be erroneous. Everything that was done by the officers of the Court under its order was good until that order was set aside; and, being good, of course the persons who carried it out were not wrong-doers. Therefore, the only account which can be had against them is an account on the footing that what they had received was received for the benefit of the alleged debtors, with the obligation of reimbursing the person who collected the receipts the cost which he was put to in getting them; and that seems the basis of the account which the appellants claim. For these reasons I think the appeal must be allowed.

Appeal allowed.

Solicitors: *Bentwich, Watkin-Williams & Grey; J. H. Moggridge.*

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May 14.

CRAIG *v.* NICHOLAS.

Turnpike Acts—Tolls—Exemption—Carriage employed in Military Service of Crown—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 143.

The exemption from payment of toll in passing along a turnpike road or over a bridge contained in s. 143 of the Army Act, 1881, in favour of carriages "employed" in the military service of the Crown and conveying officers or soldiers of the regular forces on duty does not extend to the private carriage of an officer used by him for his own convenience while on duty.

CASE stated by justices for the borough of Plymouth.

An information had been laid by the appellant against the respondent which alleged that the respondent on July 10, 1899, unlawfully demanded and received from the appellant, he being then an officer of Her Majesty's regular forces on duty, a certain toll, to wit 4*d.*, for passing along a turnpike road known as the Embankment Road. At the hearing the following facts were proved or admitted.

Under a local Act, 43 Geo. 3, c. xv., s. 33, a toll of 4*d.* was payable at the Modbury Road gate on the Plymouth Embankment Road, being a turnpike road, in respect of every carriage drawn by one horse passing through the same, unless such carriage is exempt by statute. The respondent was a toll-collector at the said toll-gate in the employment of the Plymouth Corporation in whom the said Embankment Road was vested, and who were entitled to collect tolls payable under the said Act. The appellant was a major in the Royal Artillery stationed at Fort Bovisand, about six miles distant from Plymouth, but residing in Plymouth, and his duties frequently necessitated his attendance at the headquarters' office, Mount Wise, Devonport. On the morning of July 10, 1899, the appellant proceeded in his own private carriage from his residence in uniform to the headquarters' office at Devonport, where he transacted official business. He left the headquarters' office in the same carriage accompanied by his servant, a soldier, who was not in Her Majesty's uniform but in plain clothes; he then drove

through Plymouth along the Embankment Road, and through the Modbury Road toll-gate direct to Fort Bovisand, a distance of about nine miles, in order to discharge official duty at the said fort. On the arrival of the appellant at the toll-gate the defendant, being then the toll-collector at that gate, demanded and received from him a toll of 4*d.*, which he stated was in respect of the carriage which the appellant was driving, notwithstanding that the appellant informed him that he was on duty and claimed to be exempt from the payment of the toll; it was admitted that that toll was a toll demandable by virtue of the said local Act of Parliament. The carriage was the private property of the appellant, for which he personally took out an excise licence at his own cost, and it was used by him partly for his own private purposes and partly for carrying out his military duties. The appellant was in receipt of allowances from the Government for a horse in connection with his duties as a major in Her Majesty's army, but he was not in receipt of, and was not entitled to, any allowance from the Government in respect of any private carriage, and he would not have been at liberty to hire a private carriage at the cost of the Government to convey him from Plymouth to Fort Bovisand for the purpose of discharging his duties at the said fort.

It was contended upon the part of the appellant that he was on duty while driving in the carriage from Devonport along the turnpike road and through the toll-gate to Fort Bovisand, and that for the time being the carriage was a carriage employed in Her Majesty's military service conveying an officer of Her Majesty's regular forces on duty, and as such was exempt from payment of the toll by virtue of s. 143 of the Army Act, 1881 (44 & 45 Vict. c. 58).

It was contended on the part of the respondent that, inasmuch as the carriage was the private carriage of the appellant for which he personally paid the excise licence and received no allowance from the Government, it could not be said to be employed in Her Majesty's military service within the meaning of s. 143 of the Army Act, 1881.

After hearing the evidence and the solicitors for each of the

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parties, and having referred to the General Turnpike Act, 1823 (3 Geo. 4, c. 126, s. 32), the Volunteer Act, 1863 (26 & 27 Vict. c. 65, s. 45), the Mutiny Act, 1876 (39 & 40 Vict. c. 8, s. 86), and the Army Act, 1881 (44 & 45 Vict. c. 58, s. 143), and the cases *Humphrey* v. *Bethel* (1) and *Hinds* v. *Thring* (2), the justices came to the conclusion that the private carriage of the appellant while carrying him from Mount Wise to Fort Bovisand was not exempt from payment of toll at the toll-gate, and could not be regarded as being thus employed in Her Majesty's military service within the meaning of the Army Act, 1881, the carriage not having been requisitioned for military service under the Mutiny Act, or otherwise so appropriated for Her Majesty's military service as to come within the exemption. They therefore dismissed the information.

The question for the opinion of the Court was whether the justices were right in deciding that under the circumstances the appellant was not exempt from payment of any toll in respect of the said carriage by virtue of s. 143 of the Army Act, 1881. (3)

Yarborough Anderson, for the appellant. The appellant's carriage was exempt from toll as being employed in the military service of the Crown within the meaning of s. 143 of the Army Act, 1881. "Employed" in that section means "used"; the word refers to the physical fact of user, and does not imply that the Crown has any interest, however limited, in the thing employed, nor does it imply a hiring under a contract for payment. The section is satisfied if the appellant employed

(1) (1866) L. R. 1 C. P. 215.

(2) (1877) 41 J. P. 265.

(3) By 44 & 45 Vict. c. 58 (The Army Act, 1881), s. 143, sub-s. 1, "All officers and soldiers of Her Majesty's regular forces on duty or on the march, and their horses and baggage, and all prisoners under military escort, and all carriages and horses belonging to Her Majesty or employed in her military service, when conveying any such persons as above in this section mentioned, or baggage or stores, or returning from conveying the same, shall be exempted from payment of any duties or tolls on embarking or disembarking from or upon any pier, wharf, quay, or landing-place, or in passing along or over any turnpike or other road or bridge, otherwise demandable by virtue of any Act of Parliament . . . ."

—that is, used—the carriage in the military service of the Crown. The fact that there is an exemption in favour of carriages hired or requisitioned shews that temporary employment, which is equivalent to user, is recognised by the statute. The cases which were cited before the justices are wholly inapplicable.

Duke, Q.C. (*Bodilly* with him), for the respondent. The carriage was not employed on Her Majesty's military service within the primary meaning of those words. If mere use of a carriage by an officer on duty is sufficient to satisfy the section, other words are unnecessary.

[He was stopped by the Court.]

RIDLEY J. I think that this case is a clear one, and that the magistrates were right in the conclusion at which they arrived. The expression "employed" in s. 143 of the Army Act, 1881, is not used in a wide sense which would include a carriage merely *used* in the military service of the Crown. Considering the other words of the section, and the fact that allowances are made to officers of the army for carriages in respect of their military services, I think that the section must mean employed by authority of those in command, and not merely used by an individual officer in the course of military service. The word was put in because carriages which belong to the army as part of its equipment, and others which are requisitioned under s. 112 and cognate sections, ought to be exempt from payment of toll. Besides these, there is a third class of carriages and horses employed in military service for which no requisition has been made, but in respect of which an allowance is made by the Government and which are employed by an officer on duty or on the march, and these also are exempt. But this exemption does not include carriages used merely because it is the pleasure of the officer who is on duty to use them, and, in my judgment, such an extension of the exemption from toll was not contemplated by the Legislature when the Act was passed.

BIGHAM J. I am entirely of the same opinion. I do not think that the facts of the case bring the carriage in question

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within the exemption in favour of carriages "employed" in the military service of the Crown.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Parker, Pritchards, Barham & Lawford, for Ellis, Plymouth.*

Solicitor for respondent: *Solicitor to the Treasury, for Watts, Ward & Anthony, Plymouth.*

W. J. B.

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May 16.

THOMAS *v.* VAN OS.

Metropolis—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 47—*Unsound Food, Destruction of—Duty of Magistrate.*

Where proceedings are taken before a magistrate under s. 47 of the Public Health (London) Act, 1891, for the condemnation as diseased, or unsound, or unwholesome, or unfit for the food of man, of an article seized by a medical officer of health or sanitary inspector under the provisions of that section, the magistrate has no jurisdiction to inquire whether the article was intended for the food of man, but is bound to order its destruction upon being satisfied that it is in fact diseased, or unsound, or unwholesome, or unfit for the food of man.

CASE stated by a metropolitan police magistrate, who had dismissed an application of the appellant under s. 47 of the Public Health (London) Act, 1891, for an order condemning certain strawberries as unsound.

From the information of the appellant, the medical officer of health for Limehouse, to which the respondent and a carman named Whitlock were parties, it appeared that on the morning of the day on which the information was laid the appellant had seen a van containing 117 tubs of strawberries in Devonport Street, Ratcliff, which, in his opinion, were unsound, unwholesome, and unfit for the food of man; he had had them brought to the court, and asked for their condemnation. The respondent was a general merchant, and had a contract with a merchant or grower in Holland to send him strawberries daily except Fridays, the quantity depending on instructions wired by him to Holland. He had wired for three tons to be sent by

the Sunday's boat from Rotterdam, and had given instructions to collect them at Bishopsgate Street Station and take them to John Moir, Limited, to sell them. The respondent, who had seen the strawberries in the station-yard and examined them, admitted that they were unsound and unfit for the food of man, and consented to their destruction. From the information of the carman it appeared that when the manager of John Moir, Limited, saw the strawberries he refused to receive them.

After setting out the information, the case stated by the learned magistrate proceeded as follows:—

"Upon reading the information I considered that not only was there no evidence that the fruit was intended for the food of man and sold or exposed for sale or deposited for the purpose of sale at the time of the seizure, but that there was actual proof that it was not intended for the food of man or exposed or deposited, &c. The information shewed that the original intention of Van Os that the fruit should be used for the food of man was exhausted upon its rejection by John Moir, Limited. I considered that I was entitled to infer from the information that Van Os was not aware of the rejection until after its seizure. There was, therefore, no opportunity between the rejection and the seizure for any fresh intention to attach to the fruit on the part of any person having property therein. Being, therefore, of opinion (1.) that there was no evidence that at the time of the seizure the fruit was intended for the food of man, or exposed for sale or deposited, &c., and, moreover, finding as facts (2.) that there was no intention at the time of the seizure to use the fruit for the food of man and that it was not there exposed for sale or deposited, &c., I ruled that (3.) I had no jurisdiction to make any order. I was further of opinion that, even if I had jurisdiction, (4.) I had a discretion as to whether I need further hear and determine the matter of the said application, i.e., to decide whether the fruit was unsound, and in the exercise of that discretion I ruled that (5.) it was right to refuse to further hear and determine the matter of the application. With reference to the last finding, I felt that the owner, Van Os, having consented, there was no obstacle to the immediate destruction of the fruit; if

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in breach of faith Van Os should, after the refusal of the order, have resisted the destruction of the fruit, that would have furnished evidence of a fresh intention, and the application could have been renewed. It was not suggested that the order was required as a condition precedent to a prosecution, nor, in my opinion, would any prosecution be possible, as the only owner in this country who could possibly be liable was Van Os, and, as I have above shewn, there was proof in the information that he had had no opportunity of forming any fresh intention as to the disposal of the fruit. An order of destruction of three tons of strawberries in 117 tubs without a personal and immediate examination would have been contrary to the usual practice, and, in my opinion, unsatisfactory, as the legal position of third parties abroad might have been prejudiced. I therefore came to the conclusion that I ought not to delay the ordinary heavy business of a Monday morning, which on this occasion consisted (inter alia) of ninety night charges, to enter upon a futile investigation with a view to an order which could in no possible way be required in the public interest, at any rate as the case was then put before me.

"The questions for the Court, therefore, are:—

"1. Whether I was right in finding that there was no evidence that the fruit, at the time of the seizure, was intended for the food of man or was exposed for sale or deposited in any place for the purpose of sale, &c.

"2. Whether I was justified in finding upon the evidence that the fruit, at the time of seizure, was not intended for the food of man, and was not deposited in any place for the purpose of sale, &c.

"3. Whether, if there was no evidence that the fruit at the time of the seizure was intended for the food of man or was deposited in any place for the purpose of sale, &c., I had jurisdiction to make an order.

"4. Whether, upon my finding as a fact that the fruit at the time of the seizure was not intended for the food of man, and was not deposited in any place for the purpose of sale, &c., I had jurisdiction to make an order.

"5. Whether, if I had jurisdiction to further hear and

determine for the purpose of deciding whether the fruit was unsound, I had discretion under the circumstances to refuse to so further hear and determine.

"6. Whether, if I had such discretion, I have legally exercised it under the circumstances.

"If, in answering the above questions, this honourable Court is of opinion that I must further hear and determine the above matter without the advantage of the usual examination of the food alleged to be unsound, which in this instance is obviously not now in being, then this case is to be remitted to me for that purpose. If, on the contrary, the Court is of opinion that I should not further hear and determine, then this appeal is to be dismissed." (1)

R. D. Muir, for the appellant. The magistrate had no jurisdiction upon these proceedings to inquire whether the fruit was intended for the food of man or was exposed or deposited for sale; having satisfied himself that the fruit was unsound and unfit for the food of man, he had only to perform the ministerial duty of ordering its destruction. Under the Public Health Act, 1875, it has been held that the duty of deciding

(1) By s. 47, sub-s. 1, of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), "Any medical officer of health or sanitary inspector may at all reasonable times enter any premises and inspect and examine (*a*) any animal intended for the food of man which is exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and (*b*) any article, whether solid or liquid, intended for the food of man, and sold or exposed for sale or deposited in any place for the purpose of sale or of preparation for sale, the proof that the same was not exposed or deposited for any such purpose or was not intended for the food of man resting with the person charged; and if any such animal or article appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

By sub-s. 2, "If it appears to a justice that any animal or article which has been seized or is liable to be seized under this section is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of sale or exposure for sale, or deposit for the purpose of sale or of preparation for sale, or in whose possession or on whose premises the same was found, shall be liable on summary conviction to" a fine or imprisonment.

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whether meat is exposed or deposited for sale or is intended for the food of man is cast upon the medical officer of health: *White* v. *Redfern* (1), and he has identical powers under the Public Health (London) Act, 1891. The condemnation is a mere executive act: per Field J. in *Vinter* v. *Hind.* (2) The proceedings dealt with in sub-s. 1 and in the earlier part of sub-s. 2 of s. 47 are in fact proceedings against the article with a view to procure its condemnation; it is only when under the latter part of sub-s. 2 proceedings are taken against the man that the fact that the article is intended for the food of man becomes material.

[He was stopped by the Court.]

The respondent did not appear.

RIDLEY J. At first I was inclined to think that the course taken by the learned magistrate was primâ facie a reasonable one; but upon considering the decision in *White* v. *Redfern* (1) I have come to the conclusion that his duty in the present case was merely ministerial—that is, to order the destruction of the strawberries—and that he was not entitled to consider the question whether they were intended for the food of man. At that moment the intention of the respondent to sell the fruit was not material, nor was it a fact that ought to have been inquired into. The respondent was not before the magistrate as a person charged with an offence, and it is clear from *White* v. *Redfern* (1) that he would not be a person charged until a summons had been taken out against him for exposing the fruit for sale; only on the hearing of such a summons would the intention become material. Until that decision was given it was, I think, reasonable to take the same view of the law as was taken by the magistrate in the present case; but it is now clear that the early portion of s. 47, under which the order for destruction of the fruit was asked for, relates to proceedings against the article (if I may use the expression) and not to proceedings against a person. I have not a doubt that *White* v. *Redfern* (1) was properly decided, and that it is the only possible way in which effect could be given to the section. I

(1) (1879) 5 Q. B. D. 15. (2) (1882) 10 Q. B. D. 63.

think that the learned magistrate ought to have made the order asked for, and, though the fruit has long ago ceased to exist, the case must be sent back to him with an intimation to that effect.

BIGHAM J. I agree. Sect. 47 of the Act defines what the medical officer of health or sanitary inspector is to do. Among other things, he may enter upon any premises and inspect and examine articles intended for the food of man, and sold or exposed for sale or deposited in any place for the purpose of sale or of preparation for sale. It is obvious from the power given him to enter upon premises that he must make up his mind and determine whether the article is exposed for sale or intended for the food of man. Having made up his mind that the goods come within the meaning of the section, it is his duty to examine them; if he finds that they are unsound, or unwholesome, or unfit for the food of man, then under sub-s. 2 the functions of the magistrate come into operation; those functions appear to be merely ministerial, except that he may inquire whether the article is in fact unsound, unwholesome, or unfit for the food of man; if he decides that it is, he has nothing to do but to order its destruction. We are bound to interpret the section in this manner by the decision in *White* v. *Redfern* (1), a decision which, moreover, was in my opinion correct.

Appeal allowed.

Solicitors for appellant: *C. V. Young & Son.*

(1) 5 Q. B. D. 15.

W. J. B.

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May 25.

MARKEY AND ANOTHER *v.* THE TOLWORTH JOINT ISOLATION HOSPITAL DISTRICT BOARD.

Public Authorities Protection—Neglect in Execution of Act of Parliament—Limitation of Action—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *ss.* 1, 3—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

By s. 3 of the Fatal Accidents Act, 1846, an action for the benefit of the wife, husband, parent, or child of a person whose death has been caused by the wrongful act, neglect, or default of another must be commenced within twelve calendar months of the death of the deceased.

By s. 1 of the Public Authorities Protection Act, 1893, an action against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act, must be commenced within six months next after the act, neglect, or default complained of, or, in case of continuing injury or damage, within six months next after the ceasing thereof.

An action under the Fatal Accidents Act, 1846, was brought against the defendants, a statutory body formed to provide, maintain, and manage a hospital, to recover damages for the death of a patient in the hospital caused by the negligent act of a nurse in the defendants' employment; the writ was issued more than six months, but less than twelve months, after the death of the deceased:—

Held, that the plaintiffs' cause of action arose upon the death of the deceased, and that, the action not having been brought within six months after his death, the defendants were entitled to the protection of the Public Authorities Protection Act, 1893, and the action was not maintainable.

ARGUMENT of a point of law arising on the pleadings.

The writ in the action was issued on May 19, 1899.

The statement of claim alleged that the defendants were a district board, having the control and management of the Tolworth Isolation Hospital. On October 27, 1898, one William Markey, who was the husband of one of the plaintiffs and the father of the other, was admitted to the hospital suffering from typhoid fever. On October 31 a nurse in the employment of the defendants negligently administered to him an overdose of opium, which caused his death, from which pecuniary damage resulted to the plaintiffs.

The defendants in their defence admitted the fact of death, but denied the negligence and pecuniary damage. They further pleaded as follows: "The defendants are a body constituted under the Local Government Act, 1898 (1), as the governing body of the Tolworth Joint Hospital District, which said district was formed under the said Act for the purpose of providing, maintaining, and managing the said hospital for the use of the inhabitants of certain districts mentioned in the said Act, and the said hospital is provided, maintained, and managed under the authority of the said Act and Acts therein named and not otherwise. The claim of the plaintiffs is barred by reason of s. 1 of the Public Authorities Protection Act, 1893." (2)

H. W. Wilberforce, for the defendants. The action is barred, it not having been commenced within six months of the cause of action arising, as required by s. 1 of the Act of 1893. The defendant body was constituted under 61 & 62 Vict. c. lxxxii., for the management of a hospital established by the Kingston Union; they are a statutory body, established for statutory purposes. The treatment of the deceased was a series of acts done in execution, or intended execution, of their powers under the Act of Parliament, and the alleged neglect or default was committed in the execution of the Act. The defendants come within the exact language of the Act, and are entitled to its protection. If the rural sanitary authority had remained the authority for the purposes of this hospital, they would have

(1) 61 & 62 Vict. c. lxxxii. The proper title is Local Government Board's Provisional Orders Confirmation (No. 9) Act, 1898.

(2) By 56 & 57 Vict. c. 61 (The Public Authorities Protection Act, 1893), s. 1, "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof."

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been entitled, under the Public Health Act, 1875, to a similar protection: *Edwards* v. *St. Mary, Islington* (1)

[He was stopped by the Court.]

F. Watt (*F. J. Coltman, Junior*, with him), for the plaintiffs. The plaintiffs were not bound by the limitation in the Act of 1893. The action is brought under the Fatal Accidents Act, 1846 (2), under which the actual damage suffered by the family of the deceased is the only foundation for the action; that Act does not provide that the cause of action which would have been available to the injured man had he not died is to survive to his wife and children; there must be actual damage to the latter in order to support an action. There was no damage to the plaintiffs up to the time of the death of the deceased; after his death the damage commenced, and there is a continuance of damage and injury within the meaning of s. 1 (*a*) of the Public Authorities Protection Act which may last during the lifetime of the plaintiffs. The case of *Darley Main Colliery Co.* v. *Mitchell* (3) is an authority to shew that the accrual of the damage is the foundation of the cause of action, and that the period of limitation begins to run from that time. The Fatal Accidents Act gives twelve months in which to bring the action, and the special code of procedure in that Act is not repealed either expressly or by implication in the Public Authorities Protection Act; the general words in the later Act are, in the language of Lord Selborne in *Seward* v. "*Vera Cruz*" (4), "capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation." [He also cited *Crumbie* v. *Wallsend Local Board.* (5)]

DARLING J. In this case it is admitted that the defendants are a public body, and that they acted under 61 & 62 Vict. c. lxxxii., which gives certain powers and privileges to this body. The action is brought on this state of facts. The defendants, as a part of their public duty under that Act, main-

(1) (1889) 22 Q. B. D. 338.
(2) Better known as Lord Campbell's Act.
(3) (1886) 11 App. Cas. 127.
(4) (1884) 10 App. Cas. 59, at p. 68.
(5) [1891] 1 Q. B. 503.

tained a hospital, in which the plaintiff's husband was a patient; a nurse, who was a servant of the defendants, and part of whose duty it was to give medicine to the patients, administered to this man a sleeping-draught which was so strong as to prove fatal. His widow was entitled to bring an action against the defendants, alleging negligence on the part of the nurse; that right she had under the Fatal Accidents Act, which says in s. 1 that, "Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." And s. 3 provides that the action shall be commenced within twelve months after the death. It appears to me that the argument of the plaintiffs' counsel comes to this. Sect. 1 of 56 & 57 Vict. c. 61 provides, with regard to actions against public bodies, that "the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of." This action was brought more than six months after the death, and if the section stopped there, there could be no possible doubt that the action was out of time. But the section goes on to say, "or, in case of a continuance of injury or damage, within six months next after the ceasing thereof"—that is, of the injury or damage. The plaintiffs' counsel suggests that the damage to the widow does not cease till her death, and that the action need not be brought until six months after the damage has ceased. Logically, that would seem to mean six months after the death of the widow; but I do not decide whether the action could be brought by her executors. But these words do not apply to the Fatal Accidents Act, or to such actions as that Act relates to. The scheme of that Act is that there is, presumably, a cause of action in the deceased person, that he has a legal right which has been injured, but that, as he is dead and cannot take advantage of his right, a legal remedy in

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Darling J.

respect of that cause of action is given to his widow. Applying this to the words "continuance of injury or damage," I think that there was no continuance in the husband, for he was dead, and that continuing damage to the widow is not that in respect of which the Fatal Accidents Act gives a remedy. The proper construction of the Act is that there has been an injury done to the deceased, and that the remedy which he cannot himself exercise is given to his widow; the calculation of the six months runs from the time of the legal injury—that is, the giving of the dose or the appearance of its evil effects. The cases cited to us are inapplicable to the present case, except in this sense: that if the evil effects of the opium given had only become apparent six months afterwards, the man could have sued when they became apparent. If a man were given a dose of a slow poison which killed him at the end of a year, his widow could, I think, bring her action upon her husband's death: this follows the language of the Act, and, therefore, the decisions as to subsidence of land, if they have any application, only shew that it was not the giving of the opium, but the moment when it caused the damage to health, that should be regarded. When the case is looked at in this way, it is plain that the words "continuance of injury or damage . . . ." cannot mean that a case is taken out of the section and that an action can be brought at any time because the potential earnings of the husband must be considered as lost to the widow at any time before her death.

Then the plaintiffs' counsel contends that, as the Fatal Accidents Act gives a limit of twelve months for bringing an action, and the Public Authorities Protection Act gives one of six months, we ought to hold that the later Act does not touch the earlier. I do not agree with this contention. It is true, as he says, that the action must be brought under the Fatal Accidents Act within twelve months, and the Act of 1893 does not interfere with that limitation except as to actions against certain specified persons who must be sued within six months; the Act does not interfere with the Fatal Accidents Act, except that as to certain classes a different time limit is imposed—a limit

which affects not only an action under that Act, but also any action under any Act. The two Acts do not conflict in any way. This action should have been brought within six months, calculated from the death of the deceased, and our judgment must be for the defendants.

BIGHAM J. I agree. The question is a very simple one. When did this cause of action arise? If the man had lived, it would have been when the damage was caused to himself. But he died, and the persons mentioned in the Fatal Accidents Act may bring an action to recover damages for their pecuniary loss, if they can prove it; the two things together give the cause of action. We do not know whether in this case there was any pecuniary loss; that is a question of fact. So far as the plaintiffs' cause of action is concerned, it is the same as the deceased man's would have been had he lived—the giving of the overdose of opium; and as this action has been brought more than six months after the death of the deceased, it cannot proceed.

Judgment for the defendants.

Solicitor for plaintiffs: *Thomas Young.*

Solicitor for defendants: *John W. Sykes, for James Edgell, Kingston-on-Thames.*

W. J. B.

1900
June 13.

LANGLEY *v.* BOMBAY TEA COMPANY.

Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28)—*False Trade Description*—"*Applied*" *to Goods*—*Representation implied from Conduct.*

The appellant went into the respondents' shop and asked for two half-pounds of tea. The respondents' salesman handed him two packets of tea, for which he paid. The packets respectively contained less than half-a-pound weight of tea:—

Held, that the mere handing of the packets to the appellant in response to his demand did not constitute an "application" to the goods of a false trade description of their weight within the meaning of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887.

CASE stated by justices of Newcastle-upon-Tyne.

An information was laid by the appellant, charging that the respondents did on December 2, 1899, unlawfully sell certain goods, to wit, two half-pounds weight of tea, to which a false trade description, namely, a false trade description or statement as to the weight of the said goods, was applied, contrary to the provisions of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887. (1)

At the hearing of the information the following facts were proved or admitted. On December 2, 1899, the appellant at the respondents' shop, No. 76, Clayton Street, Newcastle-upon-Tyne, asked for two half-pounds of tea. The tea was lying in packets on the counter. One of the respondents' salesmen took two packets, wrapped them in paper, and handed them to the appellant, who paid 2*s.* 6*d.* for them. Nothing was said

(1) By the Merchandise Marks Act, 1887, s. 2, sub-s. 2, "Every person who sells . . . . any goods or things to which any . . . . false trade description is applied" shall, unless he proves that he acted innocently, be guilty of an offence.

Sect. 3, sub-s. 1: "The expression 'trade description' means any description, statement, or other indication, direct or indirect,

"(*a*) As to the . . . . weight of any goods."

Sect. 5, sub-s. 1: "A person shall be deemed to apply a . . . . trade description to goods who

"(*d*) Uses a . . . . trade description in any manner calculated to lead to the belief that the goods in connexion with which it is used are designated or described by that . . . . trade description."

by the salesman, who simply handed over the parcel to the appellant, who took it to William Taylor Denton, an inspector of weights and measures. The parcel was then opened, and it was found that each packet containing the tea was stamped in ink as follows: "The weight of this package including the wrapper is half lb." There was no evidence that this was specifically brought to the knowledge of the appellant at the time of sale. The said W. T. Denton weighed the said packets and their contents, with the result that one packet was found to contain 144½ grains less than half a pound, and the other 132 grains less than half a pound. In each case the weight including the paper wrapper was in excess of half a pound—twenty-four grains in the one case, and thirty-five grains in the other.

It was contended on behalf of the appellant that the mere handing over of the packets of tea in the manner above described to the appellant, who had asked for two half-pounds of tea, was a tacit representation by the respondents' salesman that each packet contained half a pound of tea, and that, as the packets in fact contained less, a false trade description had been applied to the goods within the meaning of the statute.

The justices were of opinion that the "trade description" contemplated by the statute was something written, printed, or stamped, that a verbal description alone would not be sufficient, and a fortiori not a mere inference from conduct, as in the case before them. They accordingly dismissed the information subject to a case for the opinion of the Court.

Robson, Q.C., and *Jacobs*, for the appellant. By s. 3, sub-s. 1, of the Merchandise Marks Act, 1887, the expression "trade description" includes any "statement or other indication, direct or indirect, (*a*) As to the . . . . weight of any goods." The respondents' salesman, by impliedly representing that the packets contained half a pound of tea, "applied a false trade description" within the meaning of the Act. The term "applied" is capable of two interpretations: it may mean a physical application of some writing, printing, or other mark to the goods themselves, or to the case or wrapper in which they are

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contained; or it may be understood in the non-physical sense in which an epithet is said to be applied to a particular subject-matter, and in which sense the "application of a trade description" would include statements by whatever means conveyed, whether by writing, word of mouth, or conduct. But the term "applied" is capable of those two interpretations only; there is between them no tertium quid. Now, it has been held in *Budd* v. *Lucas* (1) that the Legislature did not use the term in the former sense, and that a description of goods in an invoice was not the less applied to the goods because the invoice was not physically attached to them. And that case was pronounced by Lord Russell of Killowen C.J., when delivering the judgment of a Court of six judges in *Coppen* v. *Moore* (*No.* 2) (2), to have been well decided. The decision turned largely upon the comparison of the language of the Act of 1887 with that of the earlier Merchandise Marks Act of 1862, which dealt with trade-marks and nothing else. But, as was pointed out in *Budd* v. *Lucas* (1) by Mr. Channell in the course of his argument for the respondent, the logical conclusion from that decision would be that a verbal statement would equally come within the section; and if a verbal statement, then also a statement to be implied from conduct. When once it is conceded that the trade description which is to be applied is not confined to something analogous to a trade-mark, and need not be physically attached to the goods, there is no reason why one should stop short at statements made in writing or print. It is true that in *Coppen* v. *Moore* (*No.* 1) (3) there is a dictum of Wright J. that the Act does not apply to a trade description which is wholly verbal. But it was unnecessary to the decision, he having found as a fact that there was a description in writing.

Sir E. Clarke, Q.C., Joseph Walton Q.C., T. Willes Chitty, and *Clarke Williams*, for the respondents, were not called on.

GRANTHAM J. I am of opinion that the decision of the magistrates in this case was right. To my mind, it would be

(1) [1891] 1 Q. B. 408. (2) [1898] 2 Q. B. 306, at p. 311.
(3) [1898] 2 Q. B. 300, at p. 304.

a straining of the language of the Act to hold that the conduct of the respondents' salesman was an application to the goods of a trade description of their weight. The only statement of their weight which was applied to them was that printed on the wrapper in which the tea was contained, and that statement was true.

CHANNELL J. I am of the same opinion. I agree with the opinion of Wright J. in *Coppen* v. *Moore* (*No.* 1). (1) It is true that, as Mr. Robson has said, that that expression of opinion was unnecessary to the decision, but it was deliberately expressed, for it appears from the report (2) that the learned judge had at first taken the opposite view, and in the course of argument had suggested that a verbal use of a false trade description might be sufficient, and the expression of opinion in his judgment was evidently inserted with the direct object of correcting the earlier suggestion. Under those circumstances, I think that we ought to follow his view. But independently of that, I agree with it; though at the same time I do not dispute that the point was very arguable. The appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Rowe & Maw.*
Solicitors for respondents: *Crowders, Vizard & Oldham.*

(1) [1898] 2 Q. B. 300, at p. 304. (2) [1898] 2 Q. B. at p. 303.

J. F. C.

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June 21.

[IN THE COURT OF APPEAL.]

THE GREAT WESTERN RAILWAY COMPANY *v.* THE LONDON AND COUNTY BANKING COMPANY, LIMITED.

Banker — Cheque — Defective Title — Receiving Payment for a Customer — "Customer" — Liability of Banker — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 81, 82.

In order to constitute a person a "customer" of a bank within the meaning of s. 82 of the Bills of Exchange Act, 1882, it is not necessary that he should have an account at the bank.

A rate-collector had been in the habit for several years of receiving cheques for rates and cashing them at a country branch of the defendants' bank, where he was known, but had no account. By falsely pretending to the plaintiffs, who were ratepayers, that a rate had been made and was due, he obtained from them a cheque, drawn to his order upon a London bank, crossed generally, and marked "not negotiable." He indorsed the cheque and handed it in to the defendants' branch bank, where it was cashed for him, a portion of the proceeds being applied by the bank according to his request, and the balance being handed to him in cash. This balance he appropriated to his own use. The defendants received payment of the cheque from the bank on which it was drawn before the collector's fraud was discovered. In an action to recover the amount so paid, it was found as a fact that the defendants received the payment in good faith and without negligence:—

Held, that in the circumstances the rate-collector, although he had no account with the defendants, was a "customer" of the bank within the meaning of s. 82 of the Bills of Exchange Act, 1882, and (Vaughan Williams L.J. doubting) that the defendants received payment of the cheque for the rate-collector and not for themselves; and that, therefore, the defendants were protected by s. 82, and were not liable.

Judgment of Bigham J., [1899] 2 Q. B. 172, affirmed.

APPEAL from the judgment of Bigham J. at the trial of the action without a jury, reported [1899] 2 Q. B. 172.

The action was brought to recover the sum of 142*l.* 10*s.* as money had and received by the defendants to the use of the plaintiffs, or, in the alternative, as damages for the conversion of a cheque.

A rate-collector named Huggins had been for many years in the employment of the Wantage Rural District Council and

of other similar bodies. In this capacity he used to receive from the plaintiffs and others, who were ratepayers, cheques for the amounts payable by them for rates. He was well known to the manager and officials of the defendants' branch bank at Wantage, and the cheques so received, both those crossed and marked "not negotiable" and those not crossed, he had for about twenty years been in the habit of cashing through the bank at Wantage. A considerable number of cheques (fifty or sixty) were cashed in this way by him in the course of each year. Apparently Huggins, on the receipt of the money for the cheques, distributed it among the local bodies to whom he had to account; and at times the bank, at Huggins's request, placed a part of the money, which otherwise would have been handed to him, to accounts named by him. Huggins kept no account with the defendants, nor had he any pass-book. The cashing of each cheque by the bank was a separate and independent transaction.

In November, 1898, Huggins falsely pretended to the plaintiffs that a rate had been made, and that the plaintiffs owed in respect thereof 142*l.* 10*s.* By this means he obtained a cheque from them for that amount. The cheque was drawn on the head office of the London Joint Stock Bank in favour of Huggins or order; it was crossed generally and marked "not negotiable." The plaintiffs always paid Huggins the rates due from them by cheques in this form. On November 16 Huggins, in accordance with his usual course of dealing with the defendants, took the cheque to their bank at Wantage to get it cashed. He indorsed it and handed it across the counter to the bank clerk. The latter filled up a paying-in slip, which Huggins signed. The paying-in slip contained no reference to the cheque itself, but purported to shew a payment into the bank of 142*l.* 10*s.* in money, a payment out to Huggins of 117*l.* 10*s.*, and a payment of 25*l.* at his request to the credit of the Wantage Rural District Council's account at the bank, Huggins thus in effect receiving the amount of the cheque, 142*l.* 10*s.* He appropriated the 117*l.* 10*s.* to his own use. No entry was made in the bank books, nor was any receipt or other document given in relation to this transaction. Having

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thus obtained the cheque, the defendants crossed it to themselves, and sent it to their head office in London for collection. On November 17 the cheque was duly presented to the London Joint Stock Bank and paid. After the cheque had been paid the plaintiffs discovered the fraud of Huggins, and they then demanded the return of the money from the defendants, which was refused.

Bigham J. found as a fact that the defendants received the payment in good faith and without negligence. He also came to the conclusion that they received payment of the cheque for Huggins, and not for themselves, and that Huggins was a "customer" of the bank within the meaning of s. 82 of the Bills of Exchange Act, 1882. (1) He therefore held that the defendants were protected by that section, and he gave judgment for them. The plaintiffs appealed.

May 24. *H. D. Greene, Q.C.*, and *Asquith, Q.C.* (*Park Goff* with them), for the plaintiffs. The defendants are not protected by s. 82 of the Bills of Exchange Act, 1882. Huggins obtained the cheque from the plaintiffs by fraud, and therefore he had a defective title to it: s. 29, sub-s. 2. As the cheque was crossed and marked "not negotiable," Huggins could give no better title to it than he himself had: s. 81. Unless the defendants are protected by s. 82 they are liable in this action. In the first place, the defendants did not receive payment of the cheque from the London Joint Stock Bank for Huggins within the meaning of s. 82; they received payment for them-

(1) 45 & 46 Vict. c. 61, s. 29, sub-s. 2: ". . . . the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud."

Sect. 81: "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

Sect. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

selves. The defendants purchased the cheque from Huggins. It was an ordinary discount transaction. A crossed cheque marked "not negotiable" is transferable, though its negotiable quality is limited: Chalmers on Bills of Exchange, 5th ed. p. 259. The defendants, relying upon their knowledge of Huggins and their former dealings with him, took the cheque at their own risk, knowing that they could get no better title to it than he had. They gave him the full value of the cheque, as they thereby purchased an easy mode of remitting money to London. It was not the case, as Bigham J. thought, of an advance by the bank to Huggins on the security of the cheque. The defendants became holders of the cheque for value, and could have sued upon it in their own names and on their own account: *National Bank* v. *Silke* (1); *M'Lean* v. *Clydesdale Banking Co.* (2) The defendants need not have sued as agents for Huggins. That being so, it follows that they did not hold the cheque and receive payment thereof as agents for Huggins. Secondly, if the defendants did receive payment of the cheque for Huggins, the latter was not a "customer" of the bank within s. 82. A "customer" means a person who has an account at the bank: see Grant on Banking, 5th ed. p. 1. To constitute a person a "customer" of a bank within the meaning of the section there must be in existence the relation of banker and customer between them at the time of the particular transaction in dispute. Huggins had no account at the defendants' bank, nor did the transactions prior to the one in question establish the relation of banker and customer between them. In *Mathews* v. *Brown & Co.* (3) the Divisional Court held that a stranger who came to a bank and asked the bank to collect a cheque for him was not a "customer" within the meaning of s. 82. In *Lacave & Co.* v. *Crédit Lyonnais* (4) Collins J. thought (5) that a person to be a "customer" must have an account at the bank. Even if it is going too far to say that a person to be a "customer" must have an account at the bank, still there must have been a

(1) [1891] 1 Q. B. 435.
(2) (1883) 9 App. Cas. 95.
(3) (1894) 63 L. J. (Q.B.) 494.
(4) [1897] 1 Q. B. 148.
(5) [1897] 1 Q. B. at p. 155.

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series of transactions between them of such a character as leads to the inference that the relation of banker and customer exists. In the present case there were no transactions of that kind. All that the bank did was to accommodate Huggins by cashing cheques for him. The defendants were, therefore, not protected by s. 82, and the plaintiffs are entitled to judgment.

[They also referred upon this point to *Fisher* v. *Roberts*. (1)]

A. T. Lawrence, Q.C., and *Guy Lushington*, for the defendants. The plaintiffs have not made out any cause of action against the defendants. The cheque, though obtained from the plaintiffs by fraud, was drawn and handed to Huggins with the intention that he should receive payment of it. The transaction was voidable and not void, and the plaintiffs cannot avoid the transaction as against the defendants after the latter have bonâ fide and without notice of the defective title given value for the cheque: *White* v. *Garden* (2); *Cundy* v. *Lindsay*. (3) Sect. 81 of the Bills of Exchange Act, 1882, does not enable the plaintiffs to disaffirm the transaction in such a case. As regards the cause of action for conversion, there was no conversion of the cheque. The plaintiffs intended that the bank by which the cheque should be presented should receive payment thereof from the bank on which it was drawn. The cheque was indorsed by Huggins when handed to the defendants, Huggins's indorsement being an authorized act. A conversion is where a person does an unauthorized act which deprives another of his property permanently or for an indefinite time: *Hiort* v. *Bott*. (4) Nor is there a cause of action for money had and received. The defendants have not received the money of the plaintiffs. A cheque is not an assignment of funds in the hands of a banker: *Hopkinson* v. *Forster*. (5) The defendants received money which belonged to the London Joint Stock Bank, on whom the cheque was drawn. The plaintiffs could only have sued Huggins as upon a total failure of consideration, there being no rate due when

(1) (1890) 6 Times L. R. 354.
(2) (1851) 10 C. B. 919.
(3) (1878) 3 App. Cas. 459.
(4) (1874) L. R. 9 Ex. 86.
(5) (1874) L. R. 19 Eq. 74.

the cheque was given. But that ground of claim cannot avail them as against the defendants, who have bonâ fide given value for the cheque. The plaintiffs by drawing the cheque represented that it would be paid on presentment, and after it has been presented and paid they seek to follow the money and to recover from the defendants the sum so paid. Such a claim is untenable. Further, the defendants had a good title to the cheque, as s. 81 does not apply. That section says that a person taking a crossed cheque with the words "not negotiable" thereon shall not have a better "title to the cheque" than that which the person from whom he took it had. By s. 73, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque except where otherwise provided. By s. 59, a bill is discharged by payment in due course—that is, by payment to the holder thereof in good faith and without notice that his title is defective. This cheque was, therefore, discharged by payment in due course by the London Joint Stock Bank, and no question of title to the cheque could arise in the action. The cheque had been paid and discharged before the action was commenced. Therefore the title to the cheque did not come in question within the meaning of s. 81, and that section does not apply. [*Nash* v. *De Freville* (1) was also referred to.]

With regard to the argument upon s. 82, the true inference from the facts is that Huggins was a "customer" of the bank within the meaning of that section. He had been in the habit for about twenty years of taking cheques to this bank and getting them cashed over the counter. These transactions constituted the relation of banker and customer between Huggins and the bank. It is not necessary that the person to be a "customer" should have an account at the bank. In *Mathews* v. *Brown & Co.* (2) and *Lacave & Co.* v. *Crédit Lyonnais* (3) there were isolated transactions between the bank and a stranger, and in both cases it was held that there must be some closer relation between them than that which existed in either of those cases. Again, the bank received payment of the

(1) [1900] 2 Q. B. 72. (2) 63 L. J. (Q.B.) 494.
(3) [1897] 1 Q. B. 148.

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cheque for Huggins. No doubt they paid him the amount of the cheque when he handed it over the counter; but they were willing to do this as they knew Huggins, who apparently occupied a respectable position. They did not discount the cheque, as nothing was deducted from its face value for discount. The true view is that adopted by Bigham J., that the defendants advanced to Huggins the full value of the cheque, and then collected the amount for him and repaid themselves the advance out of the proceeds of the cheque. Sect. 82, therefore, protects the defendants.

H. D. Greene, Q.C., in reply. An action for money had and received will lie: *Bavins* v. *London and South Western Bank*. (1) The defendants have retained the money, which the plaintiffs had to pay, after notice that Huggins had a defective title to the cheque and after notice of the plaintiffs' claim.

Cur. adv. vult.

June 21. A. L. SMITH L.J. read the following judgment:— This action is brought by the Great Western Railway Company to recover from the London and County Banking Company as money had and received by the defendant bank to the use of the plaintiffs a sum amounting to 142*l.* 10*s.*, or, in the alternative, in trover for a cheque for the like sum, which cheque had been fraudulently obtained from the plaintiffs by a man named Huggins, and which had been cashed by the defendants for Huggins and its proceeds received by the defendants from the plaintiff company under the following circumstances. Huggins was a rate-collector at Wantage, and by falsely pretending to the plaintiff company that certain rates were due from them obtained from the plaintiff company in supposed payment of the rates the cheque in question. It was a cheque drawn by the plaintiff company upon the London Joint Stock Bank in London in favour of Huggins or order, and was crossed "and Co.," "not negotiable." It was proved that the plaintiff company always paid Huggins the rates due from them by cheques in the above form. The cheque, it will

(1) [1900] 1 Q. B. 270.

be seen, was a cheque drawn upon the head office of the London Joint Stock Bank in London, and what I will call Huggins's ordinary course of business with the defendant bank was to go to its Wantage branch when he received cheques from the plaintiffs, indorse them, and then present them at the Wantage branch to be cashed; and this the defendant bank was accustomed to do for Huggins. This was the course of business between the defendant bank and Huggins; and at times, at Huggins's request, the branch bank would place some portion of the cash, which would otherwise have been handed to Huggins, to accounts named by Huggins. The branch bank then forwarded the cheques so cashed for Huggins to its head office in London, which then presented and obtained payment of the cheque from the drawers, in this case the plaintiffs in this action. This, as regards the cheque in question, had all taken place before the fraud of Huggins was detected by the plaintiffs; and when they did afterwards discover it they demanded the cheque or its proceeds from the defendants, which demand was refused. The plaintiffs thereupon brought this action.

The plaintiffs in the first instance attempted to shew that the defendants, when they took the cheque, took it with notice of Huggins's fraud; but in this they wholly failed, and this was abandoned at the trial. I will assume that money had and received or trover will lie in the circumstances of this case; but in the view I take it is not necessary to decide this, for supposing, as I will, that such actions or either of them will lie, if the question decided by my brother Bigham is rightly decided, as I think it is, this question becomes immaterial, for the real question is, Did the defendant bank in cashing the cheque for Huggins as they did, though crossed and with the words "not negotiable" thereon, come within the protection afforded to bankers by s. 82 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61)? It is true that s. 81 of the Act enacts that "where a person takes a crossed cheque which bears on it the words 'not negotiable' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had"—in this case no

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better title than Huggins, which after disaffirmance of the transaction by the plaintiffs would be no title at all. But s. 82 protects a banker who receives payment for a customer of a crossed cheque as follows: "Where a banker in good faith and without negligence"—which it is admitted is the position of the defendant bank—"receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Two points are made by the plaintiffs upon this s. 82. The first is that Huggins was not a customer of the bank within the meaning of the section; and, secondly, if he were, the bank did not receive the proceeds of the cheque from the plaintiffs for their customer but for themselves. It was proved that the course of business between Huggins and the defendants—namely, the defendants cashing cheques for Huggins whether crossed and with the words "not negotiable" thereon, or without being crossed, at the Wantage bank, and collecting them—had been in existence for some twenty years, and that this was the way, as between Huggins and the branch bank, in which he obtained cash for the cheques received by him as rate-collector. I agree with my brother Bigham that whether or not a man is a customer of a bank is a question of fact. I do not agree with the suggested reading of the section that the word "customer" is confined to the case of a person who keeps a current account with a bank. I can find no such limitation in the section. This is not like the case of a stranger coming to a bank upon an isolated occasion to get a cheque cashed, which was the case in *Mathews* v. *Brown & Co.* (1), where it was held that such a person was not a customer within the section, Cave J. saying that the word "customer" involves something of use and habit. In the present case there has been use and habit for twenty years. It was upon the same principle that Collins J., in *Lacave & Co.* v. *Crédit Lyonnais* (2), decided that one Ponce was not a customer, the learned judge saying that to constitute him one his relations must be much nearer

(1) 63 L. J. (Q.B.) 494. (2) [1897] 1 Q. B. 148, at p. 155.

and closer than those of Ponce in that case. I think that the cashing of the cheques for Huggins and then the collecting of the cheques by the defendant bank during a period of twenty years as a matter of fact constituted Huggins a customer of the bank, and I agree with Bigham J. as to this.

Then comes the next question, Did the bank receive payment of the cheque from the plaintiff company for their customer, Huggins, or for themselves? If they received such payment for Huggins, I do not see how it can be even argued that Huggins was not their customer. It is said for the plaintiffs that the defendant bank did not do so, for it purchased from Huggins the cheque in question, and took it for better or for worse. I cannot think so. The defendant bank charged nothing for undertaking the suggested liability. Why should they have done so? I heard no reason, and I cannot conceive why they should have done so. The truth is that the branch bank, to accommodate Huggins and possibly themselves, in being able thus to pass money to London, cashed the London cheque at Wantage, undertaking to collect it for Huggins, he and not the bank standing the risk of the cheque not being met by the drawers. In my judgment they did not purchase the cheque at all. They collected it for Huggins, and not for themselves as argued. This is the inference Bigham J. drew, and I draw the same. For the reasons above I am of opinion that the defendants are entitled to the protection afforded to bankers by s. 82 of the Act, and I agree with my brother Bigham in the conclusion at which he arrived. The appeal must be dismissed with costs.

VAUGHAN WILLIAMS L.J. read the following judgment:— Apart from the Bills of Exchange Act, 1882, I think there can be no doubt but that the defendant bank would, in the circumstances of this case, have become holders for value to the extent of the amount of the cheque, and would have been able to sue in their own right for that amount. The defendants would in no sense have had to sue as trustees for Huggins. This would have been their right and position as indorsees bonâ fide for value, and that value being the full amount of the

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cheque, it seems to me immaterial to the question to be decided in the present case whether you speak of the defendants as discounters or purchasers or holders for full value. In any view they, apart from the Bills of Exchange Act, 1882, would have been holders of the cheque able to sue in their own right for the whole amount: see *Thiedemann* v. *Goldschmidt*. (1) Now, of such persons it seems to me that it would be primâ facie wrong to draw the inference that they were bankers receiving payment for a customer of a cheque indorsed generally by the payee and payable on demand, not being post-dated. Apart from some evidence of a contrary intention, the right inference to draw in such a case would be that the bankers received for themselves and not for the customer. Now, what is the evidence of contrary intention—that is, of an intention that the defendant bank should collect and receive payment of the cheque as agents for Huggins? Nothing that I can see, except the fact that they made no charge for cashing a cheque payable on demand. Against this is the fact that there are no entries in the bank books, and no receipt or other document such as one would expect if the bank were really acting as collecting agents for Huggins. The bank were willing to give cash for the cheque because they trusted Huggins. The mere absence of an express bargain in the series of years leaves the primâ facie presumption where it was. To draw the inference of agency in the absence of evidence is very like repealing the 81st section in the case of bankers. If this is the right view, does the fact that this cheque was marked "not negotiable" make any and what difference in the position of the bank? Are the defendants, notwithstanding these words "not negotiable," holders for value? I think they are. Sect. 81 runs thus: "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had." The section does not say that the person to whom the payee of the cheque gives a crossed cheque marked "not negotiable" shall not become transferee of the cheque, but merely that he shall not take a better title than

(1) (1859) 1 D. F. & J. 4, at p. 11.

that which the person from whom he took it had. The transferability of the cheque is not affected by the words "not negotiable," but only its negotiability. Such being the effect of s. 81, I see nothing in this case to induce me to draw the inference that the defendants, after they ceased to retain the cheque, by presenting it at the bank on which it was drawn, and received the amount, received or held that amount as agents for Huggins; but Bigham J. and my brethren take a different view of the facts, and draw the inference that the defendant bank received the amount of the cheque for their customer Huggins, notwithstanding the fact that when they took the cheque from him they paid him the full amount by paying for him 25*l.* to the Wantage Rural District Council and giving him the balance of 117*l.* 10*s.* in cash. I do not think that I ought to differ from three judges on a question of fact, and it therefore becomes unnecessary to consider the question of the right of action of the plaintiffs, the drawers, on the assumption that s. 82 affords the defendants no protection; but I see no reason to doubt that the plaintiffs, as true owners of the cheque, would have an action for the money obtained by the presentation of the cheque, notwithstanding the fact that the cheque, when issued, was a voidable and not a void instrument. It would have been otherwise but for the statutory effect of the words "not negotiable"; but I am inclined to think that the effect of those words is to place the person taking the cheque bearing those words in exactly the same position as the person from whom he takes it; but in the view of the facts taken by my brethren, it is not necessary to decide this question.

ROMER L.J. read the following judgment:—This is a curious case, and one of difficulty; but I have come to the conclusion that Bigham J. was right in holding the defendant bank protected by s. 82 of the Bills of Exchange Act, 1882. I think on the facts the preferable view of the arrangement between Huggins and the bank with regard to the cheque in question is that the latter was to forward the cheque for collection and to receive the proceeds on behalf of Huggins in the sense in which the section speaks of a bank receiving payment for a

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customer, and that in anticipation of such receipt the bank advanced to Huggins the amount of the cheque. Of course the bank had the right to apply the proceeds in repayment of the advance, and had a lien on the cheque for the amount of the advance; but this, while establishing that the bank had a beneficial interest to the fullest extent in the cheque, does not conflict with the position taken up by the bank that in a legal sense—in the sense of the wording of s. 82—the bank, when receiving the proceeds of the cheque, did so on behalf of Huggins. Suppose in this case Huggins had a current account with the bank, which was not in credit, and that the cheque had been paid in by him in the ordinary way as a customer, and that the bank had credited him with the amount at once, and allowed him to draw against that amount before the bank received payment of the cheque. In that case, equally with this, the bank might have had a beneficial interest in the cheque even to the extent of its full value; but it would clearly, in my opinion, have received payment of the cheque for its customer within s. 82. In that case, as in this, the bank, as against the world, would have been a "holder for value" of the cheque within the definition of holder for value in the Act. But this is perfectly consistent with the view that in both cases, within the meaning of s. 82, the bank received payment of the cheque for Huggins. The chief facts which lead me to the conclusion that in this case the bank received payment of the cheque for Huggins are that throughout the long period during which Huggins's cheques were cashed by the defendant bank there is no evidence or suggestion of any bargain being come to between them, or of any contract of purchase being negotiated or really intended. It is clear that no remuneration was paid to the bank by Huggins for advancing the amounts of the cheques, and I cannot think that it was intended that the bank should run any risk in the matter of title, or any risk whatever other than that involved in the mere advance of the amounts of the cheques. It must be remembered that what the bank cashed for Huggins were cheques payable immediately and drawn to his order, and were not even like short bills; and the true intent of the parties is, in my opinion, further shewn

by the fact that the bank advanced to Huggins the full amounts of the cheques without charge, even though some were, like the one in question in this action, crossed "not negotiable," which to a bank must necessarily have caused hesitation or doubt if the bank was doing anything more than acting as a bank in receiving payment of the cheques on behalf of a customer.

If I am right in the view that the true arrangement between Huggins and the bank in cashing his cheques was that the bank should receive payment of them for Huggins and apply the proceeds in repayment of its advances, then I cannot doubt, bearing in mind how long and continuously that arrangement had existed and been acted on, but that at the time the cheque in question in this action was cashed the relation of banker and customer existed between Huggins and the defendant bank, and that the bank received payment of that cheque for a customer within the meaning of s. 82. It cannot have been essential that a current account should have been opened, into which the advances on the cheques on the one hand and the payments to the bank on those cheques on the other hand should be entered. This view renders it unnecessary for me to consider whether, if the bank could not avail itself of the provisions of s. 82, it could as an innocent party escape liability on the ground that the payment of the cheque to it was by the act of the plaintiff company itself.

Appeal dismissed.

Solicitor for plaintiffs : *R. R. Nelson.*
Solicitors for defendants : *Harries, Wilkinson & Raikes.*

A. M.

C. A.
1900
June 25;
July 9.

[IN THE COURT OF APPEAL.]

In re DEAKIN.
Ex parte CATHCART.

Practice—Sequestration—Payment of Costs—Order XLI., *r.* 5—*Order* XLIII., *rr.* 6, 7.

In the case of a writ of sequestration issued by leave of a judge to enforce payment of costs under Order XLIII., r. 7, the provisions of Order XLI., r. 5, and Order XLIII., r. 6, are inapplicable. Therefore in such a case it is not necessary that the order for payment of costs should limit a time for payment or should bear the indorsement mentioned in Order XLI., r. 5, nor is personal service of it essential.

In re Lumley, Ex parte Cathcart, [1894] 2 Ch. 271, followed.

APPEAL from an order of Channell J. at chambers affirming an order of a master for the issue of a writ of sequestration.

An order having been made for the taxation by Master Kaye of a bill of costs, delivered by the respondent Deakin, a solicitor, to the appellant Mrs. Cathcart, the respondent appealed to the Court of Appeal, who ordered that the bill should be taxed by Master Wilberforce, and that the costs of the appeal and below should be dealt with by him, and that he should certify the amount due and by whom to be paid. Master Wilberforce subsequently certified that the respondent's costs of the appeal and below had been taxed by him and allowed at 37*l.* 3*s.* 10*d.*, and directed them to be paid by the appellant. A copy of the master's order was sent by the respondent's solicitors in a prepaid letter to the solicitor acting for the appellant at the address given for service of documents in the matter, which letter stated that, unless the amount mentioned in the order was paid by noon on the following Monday, steps would be taken to obtain a sequestration order. It was stated on affidavit by a clerk to the respondent's solicitors that he had called at Horrex's Hotel, Strand, where the appellant then resided, with a letter from his principals addressed to the appellant at that hotel, containing a copy of Master Wilberforce's order, and a copy of the letter written by them to the appellant's

solicitor as above mentioned; that the deponent sent up a message by the hotel porter to the appellant to the effect that a representative of the respondent's solicitors wished to serve her with a master's certificate and order; that the porter subsequently came down and said that the appellant said that she was not at home to the respondent's solicitors, and declined to see their representative; that the deponent then handed to the porter the letter with its inclosures, and asked him to take it upstairs to the appellant; and that the porter afterwards returned and said that he had delivered it to her personally. It appeared from an affidavit made by one of the firm of solicitors acting for the respondent that the appellant had subsequently called on him and impliedly admitted that she had received the copy of the order for costs by defying the respondent to obtain a sequestration order against her. It was likewise stated on affidavit by the respondent that the appellant was possessed of large means, and that a writ of sequestration was the only way by which the order for payment of costs could be enforced against the appellant, a writ of execution being of no avail as she lived in an hotel in London, her country residence having been locked up for years, and she kept no banking account so far as the respondent was aware. Before applying for a writ of sequestration the respondent wrote to the appellant, asking her for payment of the costs in question, and warning her that, if she did not pay them, he should apply for a sequestration, but she returned no answer to his letter.

On application by the respondent to a master for leave to issue a writ of sequestration against the appellant for contempt in not obeying the order for payment of costs, the master granted leave. The respondent then again wrote to the appellant, asking her to pay the amount ordered to be paid for costs, and so avoid the expenses of a sequestration, but she returned no answer to his letter. On appeal Channell J. affirmed the master's order giving leave to issue a sequestration.

Firminger, for the appellant. The writ of sequestration is in the nature of a proceeding for contempt, and therefore

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DEAKIN, *In re.* CATHCART, *Ex parte.*

absolute regularity in the preliminary procedure is requisite. The order for payment of costs should have been indorsed with the memorandum required by Order XLI., r. 5—namely, that, if the person on whom the order is made does not comply with it, he will be liable to process of execution for the purpose of compelling him to obey it. No such notice was indorsed on the order for payment of costs in this case. [He cited on this point *Stockton Football Co.* v. *Gaston* (1); *Hulbert & Crowe* v. *Cathcart.* (2)] Secondly, personal service of the order for payment of costs was essential, and there is no proof of such service: Order XLIII., r. 6.

R. M. Bray, Q.C., and *H. J. Turrell*, for the respondent. Order XLI., r. 5, does not apply to an order for payment of costs: *In re Lumley, Ex parte Cathcart.* (3) It was held in that case that the issue of a sequestration to enforce an order for payment of costs is governed by Order XLIII., r. 7, the effect of which is that the old procedure in such cases by writ of subpœna and sequestration for disobedience of it is swept away, and instead thereof there must now be an application for leave to issue the writ of sequestration. On such an application the judge has all the circumstances before him, and satisfies himself on the questions whether the order for payment of costs has come to the knowledge of the person against whom the application is made, and whether there has been such a disobedience of the order as amounts to a contempt: *Hulbert* v. *Cathcart.* (4) Order XLI., r. 5, only applies where the judgment or order requires a person to do an act, in which case a time must be limited within which it must be done. This machinery is not applicable to an order for payment of costs which limits no time for payment. At any rate it is not necessary in the case of such an order: see *In re Lumley, Ex parte Cathcart* (3), where no time was limited. Order XLIII., r. 6, does not apply, for that rule is only applicable where a person is directed to pay money into court or to do any other act in a limited time, and under that rule the sequestration issues without any order. The facts

(1) [1895] 1 Q. B. 453.
(2) [1894] 1 Q. B. 244.
(3) [1894] 2 Ch. 271.
(4) [1896] A. C. 470.

clearly shew a contumacious refusal to pay on the part of the appellant.

Firminger, in reply. The question whether Order XLI., r. 5, applied was not raised in *In re Lumley, Ex parte Cathcart.* (1) It is submitted that that rule was intended to apply to all cases where proceedings are taken for contempt. [He cited *Hampden* v. *Wallis.* (2)]

A. L. SMITH L.J. I think that the order of Channell J. was rightly made. The statements made in the affidavits leave no doubt in my mind that the appellant was aware of the order for payment of these costs, and that, if she did not obey it, there would be proceedings by way of sequestration; and in my judgment her failure to comply with the order under the circumstances amounted to a contempt. Two points of law were taken on her behalf. The first is that the order was not indorsed with a warning that, if she did not obey it, she would be liable to process of execution for the purpose of compelling her to do so. The second is that there was no affidavit of personal service of the order for payment of costs upon the appellant. It was therefore said that there had been a failure to comply with the provisions of Order XLI., r. 5, and Order XLIII., r. 6. In my judgment those rules do not apply to the case of an application for leave to issue a sequestration to enforce payment of costs. Order XLIII., r. 7, is the rule applicable to such a case. The matter was dealt with by Lindley L.J. in the case of *In re Lumley, Ex parte Cathcart.* (1) He there says with reference to Order XLIII., rr. 6, 7: "Putting those rules together, and bearing in mind the old practice that the subpœna never specified the particular date of payment, it seems to me that the practice which has prevailed ever since 1883 is right—that is to say, that an order for a sequestration to issue for costs can be made on special application to the judge without any four day order having been made." It seems to me clear that, having regard to that decision, there has not in this case been any failure in any technicality which will avail the appellant.

(1) [1894] 2 Ch. 271. (2) (1884) 26 Ch. D. 746.

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DEAKIN, *In re.* CATHCART, *Ex parte.*

VAUGHAN WILLIAMS L.J. I agree. It was argued that Order XLI., r. 5, applied to this case. That rule deals with a judgment or order requiring a person to do an act thereby ordered. It was argued that an order to pay costs was such an order. It seems to me clear, having regard to the terms of Order XLII., rr. 4, 5, 6, and 7, particularly rule 7, that this is not so. The result of the provisions contained in the rules with regard to sequestration was stated by Lindley L.J. in the case of *In re Lumley, Ex parte Cathcart.* (1) He there pointed out that the rule which must be looked to with reference to sequestration to enforce payment of costs is Order XLIII., r. 7; and that the result of that rule is that the old practice of issuing a subpœna for non-payment of costs and subsequently a writ of sequestration upon disobedience of the subpœna is done away with, and that the question whether the sequestration shall issue now rests in the discretion of the judge before whom the application for leave to issue a writ of sequestration comes. No doubt the judge at chambers before whom the matter comes would refuse to allow the sequestration to issue unless he were satisfied that the order for payment of costs had come to the knowledge of the person against whom the application was made, and that the failure to comply with the order was contumacious. It appears to me that Channell J. was clearly entitled in his discretion to make the order which he made, and I see no ground for interfering with it.

ROMER L.J. I agree. Order XLI., r. 5, does not apply in the case of a sequestration issued by leave of a judge to enforce payment of costs. Both the points which have been taken on behalf of the appellant appear to me to be governed by the decision in *In re Lumley, Ex parte Cathcart.* (1) On the merits I see no ground for interfering with the decision of Channell J.

Appeal dismissed.

Solicitor for appellant: *J. A. Lound.*
Solicitors for respondent: *Morris & Rickards.*

(1) [1894] 2 Ch. 271.

E. L.

1900
June 16.

STOKES *v.* SPENCER.
HAYDON AND ANOTHER, CLAIMANTS.

Bill of Sale—Registration—Validity—Grantor known only under Assumed Name—Bill registered under True Name—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.

An unmarried woman of the name of Ott, about the year 1879, went to live with a man as his mistress and took the name of Mrs. Spencer, by which name alone she was thenceforward known. In 1893 the man made a settlement upon her, and in that settlement she was described by her true name of Ott. In 1899 she executed an absolute deed of assignment of certain personal chattels to the trustees of the settlement, by whom it was registered, and in that deed of assignment and the registration of it she was described by the name of Ott alone, no reference being made to the name of Spencer. The chattels comprised in the deed having been seized in execution of a judgment, the trustees of the settlement claimed them. On the trial of an interpleader issue, it was contended by the execution creditor that the deed, not having been registered in the name of Spencer, was invalid:—

Held, that the Bills of Sale Act, 1878, did not require the name of the grantor to be stated at all, and that, consequently, the insertion in the register of a name other than that by which alone the grantor was known did not invalidate the registration, even though the effect of it was to deprive persons searching the register of all means of ascertaining therefrom whether the grantor was the true owner or not of the chattels which were in her possession.

APPEAL from the Marylebone County Court.

In or about the year 1879 an unmarried woman of the name of Helene Madeleine Ott went to live with a man as his mistress, and continued so to live with him down to the time of his death. During the whole of that time she passed under the name of Mrs. Spencer, and was known to her servants, tradesmen, and others only under that name. In 1893 the gentleman made a settlement upon her and her children, and in that settlement she was described by her true name of Ott, and as a spinster. In 1898 the gentleman died, but she continued to reside in the same house, and continued to be generally known only as Mrs. Spencer. In 1899, being in difficulties, she applied to the Chancery Division for an order

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that a portion of the trust funds of the settlement might be applied in payment of her debts; and the Court made the order upon the terms of her assigning certain furniture and household effects to the trustees of the settlement. An absolute deed of assignment of the furniture was accordingly executed by her and registered. Throughout the proceedings in the Chancery Division, and in the deed of assignment and the affidavit filed upon the registration of the deed, she was described by the name of Ott alone, no reference being made to the name of Spencer. Subsequently to the registration of the deed, judgment for a sum of 58*l.* 4*s.* 4*d.* was recovered by one Stokes against Mrs. Spencer upon an account for laundry work. The judgment creditor having seized the goods comprised in the deed of assignment in execution of his judgment, the trustees of the settlement claimed them. On the trial of an interpleader issue in the county court, it was contended for the judgment creditor that the deed, not having been registered in the name of Spencer, under which name alone the debtor was known, was invalid. The county court judge overruled the contention, and gave judgment for the claimants. The judgment creditor appealed.

Shortt, for the appellant. The object of the Bills of Sale Act, 1878, is to give creditors facilities for discovering whether any of the persons with whom they deal have made bills of sale. In order to carry out that object, it requires all bills of sale to be registered, and by s. 12 provides that in the register the bills of sale shall be indexed under the surnames of the grantors alphabetically arranged. In order, therefore, that a creditor may get any information from the register, it is essential that the surname of the person with whom he is about to deal should be correctly stated therein. That is the starting-point of the creditor's investigation. It is true that the Act does not in terms require the name of the grantor to be correctly stated, but it implies it. The Act in terms only requires (s. 10, sub-s. 2) a "description of the residence and occupation" of the grantor. But a compliance with that requirement would be useless if the name is not correctly given, for bills of sale are not indexed

under the residences or occupations of the grantors. And where the law enjoins something to be done, it also enjoins all the means, without which that result cannot be arrived at. In *Gardnor* v. *Shaw* (1), a case decided under the Act of 1854, which was in similar terms, it was objected that the registration of the bill was bad owing to a mistake in the spelling of the surname of the grantee. The objection was overruled, but Blackburn J. said: "Had the error been in the name of the grantor the case would have been different, for then a person who comes to search the list might be deceived." In *Ex parte McHattie, In re Wood* (2), where the grantor of a bill of sale was described in the register as Joseph Wood, the name by which he was known being Joseph Albert Wood, it was held that the misdescription did not invalidate the registration. But there the misdescription was in the Christian name; the surname was correctly given, and the creditor, on searching the register, would have found under the name of Wood a person residing at the same place and of the same occupation as the person with whom he was dealing, and would, therefore, have been put upon inquiry to ascertain whether they were not, in spite of the difference of Christian names, one and the same person. This was the view of James L.J., who said: "The truth is that scarcely anybody ever dreams of looking at the Christian name of a person for whom he is searching in the register. The thing that a creditor would look for in this case would be the name of Wood. There is probably hardly any one in Chester or in the county of the city of Chester who, knowing Mr. Wood of Lache Hall Farm, and coming to look at the register for the purpose of inquiring about his circumstances, with reference to his credit, or with the view of lending money to him, would have any hesitation in concluding that Mr. Wood of Lache Hall Farm was the Mr. Wood with whom he had been dealing or was about to deal." In *Lee* v. *Turner* (3), where the name of the grantor and the nature of his occupation were both incorrectly given, it was held that the registration was bad, although the error in the description of the occupation was not

(1) (1871) 19 W. R. 753. (2) (1878) 10 Ch. D. 398.
(3) (1888) 20 Q. B. D. 773.

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sufficiently substantial to be fatal by itself. In *Downs* v. *Salmon* (1), the fact of the Christian names of the grantors being wrongly stated was held insufficient to invalidate the registration. But the same observation applies to that case as to *Ex parte McHattie, In re Wood.* (2) Field J. there laid stress on the fact that it was not alleged that the execution creditor was misled by the misdescription, or that he did not know that the description of the names of the grantors was incorrect. If the view of the county court judge in this case is right, then it follows that it is open to any fraudulently minded grantor to defeat the object of the Act, if he can manage to conceal from the grantee that the name under which the grantor is described in the bill of sale is not the name under which he is generally known at the time when the bill is executed.

[CHANNELL J. It may be that the object of the Act would in that case be defeated, but we can only deal with the Act as we find it; and there is no provision in it that the name of the grantor should be given so as to afford information to persons dealing with him.]

Scarlett (*H. Reed, Q.C.*, with him), for the respondents. The authorities are in the respondents' favour. Neither *Ex parte McHattie, In re Wood* (2), nor *Downs* v. *Salmon* (1) turned upon any supposed distinction between a misstatement in the surname and a misstatement in the Christian name, but upon the omission of the Legislature to require the name of the grantor to be stated at all. In *Central Bank of London* v. *Hawkins* (3), a man whose real name was Balham took the name of Hawkins, and in that name had judgment recovered against him. To avoid execution he removed to another neighbourhood and took the name of Barnes, and was known under that name for some three years. While so known as Barnes he granted a bill of sale in that name. Subsequently the judgment creditor discovered him, and sought to levy execution upon the goods comprised in the bill of sale. It was held that the fact of the bill not being registered under the true name of the grantor did not render the registration invalid. Pollock B.

(1) (1888) 20 Q. B. D. 775. (2) 10 Ch. D. 398.
(3) (1890) 62 L. T. 901.

went on the ground that "there is nothing in that section (s. 10) said about the name of the grantor."

[He was stopped by the Court.]

Shortt, in reply. The case of *Central Bank of London* v. *Hawkins* (1) is not in point. There the grantor's name was correctly given. A man's name is not necessarily the name under which he was born: it is the name by which he is generally known at the material date. Indeed, in that case Hawkins J. held that the bill of sale was properly registered because "It was registered in the name of the grantor, in the name by which he was known and recognised for three whole years, and he was not then known by any other name." That case is, if anything, an authority against the respondents. No doubt the conveyancer who drew the bill of sale in the present case would naturally describe the grantor in the body of the bill under the name by which she was described in the settlement, that is as Miss Ott, but he ought to have added the words "otherwise known as Spencer," so that when the bill came to be registered it might be indexed under the latter name.

GRANTHAM J. In this case I think that the judgment of the county court judge must be affirmed. The difficulty arises from the fact that the lady in question, Miss Ott, was known to all except a very limited number of persons by the name of Mrs. Spencer, and by that name alone; and the question is whether it was necessary that she should be described in the bill and upon the register as Mrs. Spencer. I think that we are bound by the decision in *Central Bank of London* v. *Hawkins* (1), amongst other authorities, to hold that it was not. There is nothing in the Bills of Sale Act requiring the grantor's name to be mentioned. Moreover, the trustees of the settlement, who were acting under the authority of a judge of the Chancery Division, in preparing the bill of sale were bound to use her true name as it appeared in the settlement. It was, indeed, suggested that the words "otherwise Spencer" might have been added. But there is no statutory provision requiring it to be done.

(1) 62 L. T. 901.

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CHANNELL J. I am of the same opinion. We start in this case with the fact that the bill of sale is sufficient at common law to vest the property in the trustees, and undoubtedly would do so apart from the requirements of the Bills of Sale Act. That being so, the only question is whether the bill is affected by any provision in that Act. The Bills of Sale Act, 1878, was intended to protect creditors, and to enable them to know whether their debtors had executed bills of sale and parted with their property, and in order to attain that object it required certain specific things to be done as conditions precedent to the validity of the bills of sale. It may be that amongst those things so required to be done something ought to have been included which has been omitted; and the authorities seem to shew that this is the case. The Act requires as a condition precedent to the validity of the registration of a bill of sale, and consequently to the validity of the bill itself, that the affidavit which is filed with the bill should contain a description of the residence and occupation of the person making or giving the same; but there is no corresponding requirement that the name of the grantor should appear on the file. That is pointed out by the judges in all the cases that have been cited, but I think most distinctly by Thesiger L.J. in *Ex parte McHattie, In re Wood* (1), where he says, "There is nothing in the Act which necessitates the name of the grantor being correctly given, that is, in regard to the validity of the registration. Sect. 1, which speaks of what is to be included in the affidavit which is to accompany the filing of the bill of sale, does not mention the name of the grantor at all. And although it is true that in s. 3"—s. 12 of the present Act—"the name, addition, and description of the person making or giving the bill of sale are included in that which is to be entered by the officer of the Court, that section does not relate to the matters which are to validate or invalidate the bill of sale, but relates solely to the duties of the officer of the department in which the bill of sale is to be filed, and constitutes only a direction to him as to the entries which are to be made." The only case in which a wrong name—and I

(1) 10 Ch. D. 398.

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think I may concede that here the name was a wrong name, not being the one by which the lady was known—can be made available for the purpose of invalidating the registration of a bill of sale, is where it is combined with a description which, although inaccurate, would nevertheless not be misleading if the name were correct, but is made insufficient and misleading when combined with an erroneous name, as in the case of *Lee* v. *Turner*. (1)

Appeal dismissed.

Solicitor for appellant: *T. K. Wadhurst.*
Solicitor for respondents: *G. J. Fowler.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1900
June 15.

In re DEAKIN. *Ex parte* DANIELL.

Bankruptcy—Costs—Solicitor—Charging Order—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Lien*—"*Property recovered or preserved*" *in Bankruptcy Proceedings—Jurisdiction—Judge of High Court—Judge in Bankruptcy—Practice—Application to discharge Order—Ex parte Proceedings—Time—Delay.*

Any judge of the High Court, whether sitting in bankruptcy or not, can make a charging order under s. 28 of the Solicitors Act, 1860; and, *semble*, so also can a judge who is a judge of the Court of Bankruptcy alone, where in the course of bankruptcy proceedings property has been "recovered or preserved."

A charging order under the section can be made by any judge of the Division in which the "suit, matter, or proceeding" has been heard, and the application for the order need not necessarily be made to the particular judge who heard the suit, matter, or proceeding.

In re Suffield and Watts, (1888) 20 Q. B. D. 693, and *In re Wood, Ex parte Fanshawe*, [1897] 1 Q. B. 314, considered.

An application to discharge a charging order under the above section, as in all cases in which it is sought to set aside ex parte proceedings, must be made promptly: for instance, an application made after the lapse of two months from the service of the order, without sufficient cause shewn for the delay, is too late.

On January 16, 1900, a receiving order was made by Registrar Giffard on a bankruptcy petition presented by judgment

(1) 20 Q. B. D. 773.

C. A. 1900

DEAKIN, *In re.* DANIELL, *Ex parte.*

creditors against Frederick Deakin; but on February 15, 1900, the Court of Appeal discharged the order, dismissed the petition, and ordered the costs of the appeal and petition to be taxed and paid by the petitioners. Mr. G. Henry Daniell had acted as solicitor to the debtor on the appeal and throughout the proceedings on the petition, and his costs were, on February 22, taxed at 42*l.* 3*s.* 5*d.* The debtor claimed to have the whole of these costs paid to him personally by the petitioning creditors on the ground, as he alleged, that Mr. Daniell had agreed to accept, in settlement of all his costs, certain payments that had been made to him from time to time in the course of the proceedings on account of costs. Mr. Daniell then gave notice to the petitioners to pay over to him the 42*l.* 3*s.* 5*d.*, but this they refused to do; whereupon, on March 23, 1900, there then being a considerable balance due to him for costs in connection with the petition and the proceedings thereon, he obtained, on the usual application, an order from Wright J. in chambers, under s. 28 of the Solicitors Act, 1860, charging the 42*l.* 3*s.* 5*d.* with his costs in reference to the appeal and petition, liberty being reserved to the debtor to apply to discharge that order. The application and order were headed, "In the High Court of Justice, in Bankruptcy, before Mr. Justice Wright," and were entitled, "In the matter of a Petition," &c., "*Ex parte* G. Henry Daniell, and in the matter of the Solicitors Act, 1860, s. 28." Notice of the charging order was served on the debtor and the petitioning creditors on March 28, 1900.

On May 26 Mr. Daniell served the debtor and the petitioning creditors with notice of an intended application "in bankruptcy" to the judge in chambers, for an order for payment to him by the petitioning creditors of the 42*l.* 3*s.* 5*d.*; and then, on May 29, the debtor served Mr. Daniell with a notice, dated the 28th, of an intended application "in bankruptcy" to the judge in chambers to discharge that order.

On May 30 both applications came on together before Wright J., sitting in chambers in bankruptcy, who held that the debtor was out of time, and, accordingly, refused his application, and ordered the petitioning creditors to pay Mr. Daniell

the 42*l.* 3*s.* 5*d.*, less their taxed costs of the application, and also ordered the debtor to pay Mr. Daniell his taxed costs of the application for the charging order and of his, Mr. Daniell's, present application, Mr. Daniell to be at liberty to retain such costs out of the 42*l.* 3*s.* 5*d.* payable under the present order, leave being given to appeal.

The debtor appealed from that order.

The appeal was heard on June 15, 1900.

It appeared that the debtor had filed no affidavit of merits in support of his application to discharge the charging order, though his counsel informed Wright J. that he had merits, and offered to file an affidavit; but the learned judge held that, whether the debtor had merits or not, his application failed as being out of time. At the hearing of the appeal the debtor's counsel tendered an affidavit since made by the debtor, filed on June 12, and served on Mr. Daniell on June 14, the day before the hearing of the appeal. The affidavit was thereupon objected to by counsel for Mr. Daniell, and the Court of Appeal refused to allow it to be read.

H. Turrell, for the debtor. Wright J. seems to have acted upon a supposed rule that, although s. 104 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), fixes no time within which a Court having jurisdiction in bankruptcy "may review, rescind, or vary any order made by it under its bankruptcy jurisdiction," yet no longer time should be given for a rehearing than for an appeal under that section: *Ex parte May.* (1) But this is not a case to which that section applies, for the judge who made the charging order was not sitting "in bankruptcy." A charging order under s. 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), cannot be made under the bankruptcy jurisdiction: it can only be made by a judge of the High Court: *In re Suffield and Watts* (2); and per Vaughan Williams J. in *In re Wood, Ex parte Fanshawe.* (3) An application to discharge a charging order may be made at any time before the order is acted on. Here no proceeding was taken upon it

(1) (1884) 12 Q. B. D. 497, 505. (2) 20 Q. B. D. 693.
(3) [1897] 1 Q. B. 314, 315-6.

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until May 26, when the debtor received notice of the intention to enforce the order, and two days afterwards he gave notice of his application to discharge that order. Again, under the express terms of s. 28 of the Solicitors Act, 1860, a charging order can only be made by the judge who has heard the suit, matter, or proceeding in which the solicitor has been employed, for the section says that in every case in which a solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, "it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending," to make a charging order for his taxed costs upon the property recovered or preserved. And in the Chancery Division it is the practice for the application for a charging under that section to be made to the judge who has heard the case. Here the application should have been made to the Court of Appeal, who made the order whereby the debtor's property was preserved.

Apart from the question of jurisdiction, the debtor had at the hearing before Wright J. a good case on the merits, though he had not then made any affidavit.

Reed, Q.C., and *G. Lawrence*, for Mr. Daniell. The decision of Wright J. was right, for two months' delay was too long for an application to discharge the charging order, and the appellant is altogether out of time. Vaughan Williams J. was incorrect in assuming, in *In re Wood, Ex parte Fanshawe* (1), that *In re Suffield and Watts* (2) decided that the Court of Bankruptcy has no power, in the exercise of its jurisdiction under the Bankruptcy Act, 1883, to make a charging order. In *In re Suffield and Watts* (2) the Chancery action was transferred, as a matter of convenience, to the Queen's Bench Division in Bankruptcy, the parties having become bankrupt, and the charging order was made by Cave J. as a judge of the Queen's Bench Division, and not as the judge exercising bankruptcy jurisdiction.

[RIGBY L.J. Is it necessary that the judge who makes the charging order should be the judge who has heard the action or matter?]

(1) [1897] 1 Q. B. 314, 315–6. (2) 20 Q. B. D. 693.

No. In *Dallow* v. *Garrold* (1) the charging order was made by a different judge. In answer to an application of this kind it is sufficient to say that a person affected by an order made in his absence must, when he has once had notice of it, come promptly if he wishes to have it discharged. In the Chancery Division the Court discourages motions to discharge orders made in chambers, and has laid down a rule of practice fixing the time for moving before the judge in court to discharge an order made by him in chambers at fourteen days, by analogy to Rules of the Supreme Court, 1883, Order LVIII., r. 15, such a motion being a rehearing, not an appeal: Annual Practice, 1900, vol. ii. pp. 435–6.

Turrell, in reply.

WEBSTER M.R. This is an appeal from Wright J., who has declined to set aside a charging order made by him on March 23, 1900. Two points have been urged against it by Mr. Turrell: the first, and main, point is that the judge who made the order had no power to make it, because the decision in favour of the debtor, Deakin, by means of which the property was recovered, was given by the Court of Appeal; and, secondly, that the application might have been made to Wright J. at any time, and was not out of time on May 29, when Deakin served notice of his application to set aside the order.

It was, in the first instance, suggested that Wright J. had acted on some hard and fast rule as to time. I doubt very much whether he did so act. I think he acted on the general rules of practice, considering that the application was made too late.

As regards the first question, namely, whether Wright J. had jurisdiction to make the order, in my opinion he had jurisdiction, because he was a judge of the High Court as well as the judge in bankruptcy. In *Dallow* v. *Garrold* (1) it seems to have been decided that any judge of the Division in which the property has been recovered or preserved can make a charging order, and it would lead to very serious consequences if

(1) (1884) 14 Q. B. D. 543, 546.

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DEAKIN, *In re.* DANIELL, *Ex parte.*

Webster M.R.

that were not so. But for what fell from Vaughan Williams J. in *In re Wood, Ex parte Fanshawe* (1), I should have thought that the judge in bankruptcy would have power to make a charging order. It seems to me that s. 28 of the Solicitors Act, 1860, which says that "the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending," may make a charging order, is wide enough to include such a case; but I do not think that is very material, because Wright J. was sitting as a judge of the High Court as well as in bankruptcy, and therefore in the one capacity or the other he had power to make the order. I do not, however, indorse the view that if the judge were only a judge of the Court of Bankruptcy he would have no power to make the order.

Then, as to the question of time. Mr. Turrell admits that no affidavit was filed by Deakin upon the application before the judge; but we are told that it was stated to the judge that he had merits, and that the judge was willing to assume the fact. That may have been so; but I do not think we can assume that the case was decided on the merits simply from a statement of that kind. It was not until two months after the order had been made that the application to set it aside was made. It is said that a person wishing to set aside an ex parte order need not move until something is done under the order. It would be very unfair if that were so. A charging order creates a charge upon the fund, and, if any application to discharge it is to be made, it should be made within a reasonable time and upon material facts being brought before the Court. Everything depends upon the facts stated, and in this case Wright J. was in my opinion right in holding that, as no notice of any application to discharge had been given by Deakin between March 28 and May 29, he ought not to set aside the charging order. The appeal must be dismissed.

RIGBY L.J. I am of the same opinion. With regard to *In re Suffield and Watts* (2) which has been alluded to—a case in the Court of Appeal—I cannot find that it lays down any rule such as it was said should be implied from the decision of

(1) [1897] 1 Q. B. 314. (2) 20 Q. B. D. 693.

Vaughan Williams J. in *In re Wood, Ex parte Fanshawe.* (1) As Mr. Reed has pointed out, the action in *In re Suffield and Watts* (2) was transferred to Cave J. as a judge of the Queen's Bench Division, it being considered a convenient thing that the particular judge who happened to have the bankruptcy proceedings to deal with should also deal with the proceedings in the Chancery Division. It was, therefore, not as a judge in bankruptcy, but as a judge of the Queen's Bench Division, that he was exercising the jurisdiction to make the charging order. I should hesitate to say—whether under the authority of that case, or independently of it—that where, in the course of bankruptcy proceedings, property has been recovered or preserved, the judge in bankruptcy cannot exercise the power of making a charging order in favour of the solicitor for his exertions in recovering or preserving the property. If it were necessary to decide that question on this application, I do not think I should be prepared to hold that the judge in bankruptcy could not make the order; but here Wright J. had both jurisdictions, as a judge of the High Court and as a judge in bankruptcy, and I do not see any objection to the order having been made by him.

As regards the question of delay, I think the learned judge was perfectly right in saying, "If you want the charging order set aside, then, the notice of it having been given you as long ago as March 28, you cannot with propriety lie by and take no steps at all until May 28; and even if you have merits, you should not have postponed stating them for so long, but should have brought them before the Court promptly." Wright J. may probably have said: "I know nothing about your merits: possibly you may have them; but it is too late now to bring forward what merits you may have." In my opinion, the learned judge was quite right in that view.

I was somewhat alarmed at the suggestion that, because the Court of Appeal made the order by means of which the property of the debtor was recovered or preserved, that Court alone could make the charging order. I have never heard it doubted that any judge of the Court which had seisin of the suit, matter, or proceeding was entitled to make the charging order.

(1) [1897] 1 Q. B. 314. (2) 20 Q. B. D. 693.

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COLLINS L.J. I am of the same opinion. Mr. Turrell objects that Wright J., though not purporting to exercise bankruptcy jurisdiction, felt himself bound by a rule as to time which applies only to bankruptcy cases. I think Mr. Turrell is wrong in his main proposition. In bankruptcy, there is, according to the practice, a certain limit of time fixed; but this is merely an instance of the application of a general rule which is found equally in the general jurisdiction in Common Law and in Chancery when exercised in relation to the setting aside of orders made on ex parte applications. It does not matter for this purpose whether the judge is exercising the jurisdiction in bankruptcy or any other jurisdiction. He is acting upon the rule underlying all proceedings—that the person who comes for relief must come with promptitude. Therefore, in my opinion, Mr. Turrell's first and fundamental point breaks down.

With regard to what was said by Vaughan Williams J. in *In re Wood, Ex parte Fanshawe* (1), as at present advised it does not seem to me that the Court of Appeal in *In re Suffield and Watts* (2) decided what Vaughan Williams J. appears to have thought they did decide. I think the Court of Appeal in the latter case was dealing with a matter which did not raise the point at all. Cave J., at the time he made the order in question, was not exercising jurisdiction in bankruptcy, but was exercising the jurisdiction vested in him as a judge of the Queen's Bench Division; and therefore it is a decision of the Court of Appeal applicable to the exercise by a judge of his jurisdiction as a judge of the High Court, and does not apply to a case in which he has no jurisdiction except in bankruptcy.

Appeal dismissed.

Solicitors: *Morris & Rickards; G. H. Daniell.*

(1) [1897] 1 Q. B. 314. (2) 20 Q. B. D. 693.

G. I. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1900
July 3.

SHOOLBRED *v.* ROBERTS.

Bankruptcy — Undischarged Bankrupt — After-acquired Property — Personal Earnings—Interpleader—Wagering Contract—Money deposited as Stakes —Stakes claimed by Trustee in Bankruptcy—Gaming Act, 1845 (8 *&* 9 *Vict. c.* 109), *s.* 18—*Gaming Act*, 1892 (55 *&* 56 *Vict. c.* 9), *s.* 1—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 44, 53.

The defendant, a professional billiard player, who was then an undischarged bankrupt, agreed to play a match at billiards with another billiard player for 100*l.* a side, and each party deposited that amount with stakeholders. The defendant won the match, and thereupon both the defendant and the plaintiff, his trustee in bankruptcy, claimed the stakes. The stakeholders interpleaded; and, the money having been paid into court, an issue was directed to try whether the plaintiff or the defendant was entitled to the money:—

Held (varying the order of Phillimore J.), that the plaintiff was entitled to the whole of the money.

APPEAL against the judgment of Phillimore J. upon an interpleader issue. (1)

In March, 1898, a receiving order was made against the defendant, a professional billiard player, and he was subsequently adjudicated bankrupt. The plaintiff was his trustee in bankruptcy. The defendant was still undischarged at the time of the after-mentioned interpleader proceedings. In November, 1898, the defendant and one Dawson, another professional billiard player, agreed to play a match at billiards for 100*l.* a side, and each party deposited that sum with the proprietors of the *Sportsman* newspaper as stakeholders. The match terminated on April 3, 1899, in favour of the defendant. On March 29, 1899, the plaintiff gave notice to the stakeholders that he should claim the 200*l.* as the defendant's trustee in bankruptcy, and on April 5 the defendant also gave notice to the stakeholders, claiming the money. The stakeholders thereupon took proceedings by way of interpleader, and the money was paid into court, and an order was made at chambers directing the trial of an issue to determine whether the plaintiff or

(1) [1899] 2 Q. B. 560.

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the defendant was entitled to the money. The learned judge decided that 100*l.* of the money belonged to the plaintiff, and must be paid out to him, and as to the remaining 100*l.* he made no order. (1)

The defendant appealed, and the plaintiff gave notice by way of cross-appeal.

Bonsey, for the defendant. The effect of *In re Roberts* (2), which was decided in the Court of Appeal subsequently to the decision appealed against, is to shew that the defendant cannot now rely, as he did in the Court below, on the contention that he is entitled to this money as against his trustee in bankruptcy on the ground that it was his personal earnings. It was decided in that case that a bankrupt can only claim to be entitled to his personal earnings as against the trustee so far as may be necessary for the support of himself and his family. The defendant cannot suggest that this sum of money is necessary for his personal support. But the plaintiff is not entitled to any part of the 200*l.* In this case there is no question of any claim by anybody for a return of the money deposited on the ground that the wagering contract was void. No notice was ever given by any one to the stakeholders repudiating that contract. The adverse claims, which were made, were for the whole 200*l.* as winnings under the wager. The case must, therefore, be treated as if the plaintiff, as the trustee in bankruptcy, and the defendant were bringing actions against the stakeholders to recover the 200*l.* as being money won by the defendant under the wagering contract, and it is clear that such an action would not lie : see *Diggle* v. *Higgs* (3) ; *Trimble* v. *Hill.* (4)

Herbert Reed, *Q.C.*, and *E. T. Holloway*, for the plaintiff. The plaintiff, as the defendant's trustee in bankruptcy, is entitled to the whole of the 200*l.* in court. He is clearly entitled to the 100*l.* which represents the money deposited by the defendant, who was then undischarged, with the stakeholders ; because this was money which belonged to him as trustee, and on notice to

(1) [1899] 2 Q. B. 560.
(2) [1900] 1 Q. B. 122.
(3) (1877) 2 Ex. D. 422.
(4) (1879) 5 App. Cas. 342.

the stakeholders not to pay it over could have been recovered by him: see *Burge* v. *Ashley & Smith, Limited.* (1) With regard to the remaining 100*l.*, Dawson has not attempted, and does not attempt, to set up any claim to it. While the stakeholders were holding the money, Dawson might have claimed a return of his deposit, but he never did so; and the only question which arose was between the defendant and his trustee in bankruptcy. Dawson cannot claim a return of his deposit now that the stakeholders have parted with the money. It must be taken that, when the stakeholders paid the money into court, it was as if they handed it over as the defendant's money subject to the question whether, as between the defendant and the plaintiff, his trustee in bankruptcy, the former was entitled to retain it. Therefore the case cannot be looked upon as analogous to an action to recover money as due under a wager, and there is no question of invoking the assistance of the Court for the purpose of enforcing a wagering contract. The real question on the issue is whether, assuming the money to have been already paid over by the stakeholders as won by the defendant, the latter is entitled to keep it as against his trustee in bankruptcy.

Bonsey, for the defendant, in reply. The payment of the money into court is merely part of the machinery in interpleader proceedings. It must be treated as if it were still in the hands of the stakeholders, and the plaintiff and the defendant were respectively suing the stakeholders for it. In such an action reliance must be placed on the wagering contract, and therefore the plaintiff could not succeed.

A. L. SMITH L.J. The question in this case is whether the whole sum of 200*l.* deposited with stakeholders to abide the result of a billiard match, or either of the sums of 100*l.*, by which it was made up, belongs to the plaintiff or to the defendant. It has, since the decision of this case by my brother Phillimore J., been held by the Court of Appeal in *In re Roberts* (2) that the personal earnings of a bankrupt belong to the trustee, if not required for the support of the bankrupt or

(1) [1900] 1 Q. B. 744. (2) [1900] 1 Q. B. 122.

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A. L. Smith L.J.

his family. The counsel for the defendant admits that by reason of that decision of the Court of Appeal he cannot now argue, as he did in the Court below, that any of this money belongs to the defendant as being his personal earnings. With regard to the 100*l.* deposited by the defendant, the matter stands thus. A sum so deposited can be recovered from the stakeholder by the depositor on his giving notice, at any time before the money has been paid over by the stakeholder, that he will no longer be bound by the wager, and that he wants to have his money back. It is clear, therefore, in any point of view, that the defendant could have recovered this money back, apart from the question of bankruptcy. That being so, it follows, in my opinion, having regard to the decision in *In re Roberts* (1), that, the defendant being a bankrupt, the money belongs to his trustee in bankruptcy, the plaintiff. With regard to the other sum of 100*l.* which was deposited by Dawson, different considerations arise. This sum has been paid into court by the stakeholders under the interpleader order. We cannot now go behind that order, or enter into the question whether it was rightly made or not; the money is in court, and the question is what is to become of it. It cannot, I think, be looked upon as belonging to Dawson, for he has had ample opportunity of asserting, but he has not asserted, and does not assert that it belongs to him. The plaintiff and defendant claiming it hostilely to one another, what is the proper order to be made under the special circumstances of this case? Dawson setting up no claim to it, I think that, as between the plaintiff and the defendant, it belongs to the plaintiff as the defendant's trustee in bankruptcy, and therefore ought to be paid to him. The result is that the order of my brother Phillimore was right as to the 100*l.* deposited by the defendant; but as to the other 100*l.*, his order should be varied by directing payment of that sum also to the plaintiff.

VAUGHAN WILLIAMS L.J. I agree. Under the peculiar circumstances of this case, I think that it will be right for us to give judgment as indicated by my Lord; but I am very anxious

(1) [1900] 1 Q. B. 122.

that it should not be supposed that our decision involves in any way the proposition that a trustee in bankruptcy, in a case where the bankrupt has made a wagering contract, and has won the wager, can come forward and claim the amount of the stakes under that contract as winnings. I am also anxious that it should not be supposed by the parties to a gaming contract that they can evade the law by agreeing that the money deposited to abide the event of a wager should be paid into court under interpleader proceedings, and an interpleader issue should be stated by consent to try the question who is entitled to that money as winnings. As I read the Gaming Acts, persons who enter into a wagering contract are not to have the assistance of the Court in any manner or shape to recover any winnings under the contract as such. I have great doubt myself whether the interpleader order in this case ought ever to have been made. Applications for such an order are governed by Order LVII. By the terms of rule 1 of that order the person seeking relief must be under liability for some debt, money, goods, or chattels for or in respect of which he is or expects to be sued by two or more parties making adverse claims thereto. I think that, where the adverse claims appear to be in respect of a sum claimed as winnings under a wagering contract, it is very doubtful whether the Court could recognise the expectation of the stakeholder that he would be sued by the claimants for that sum. But, assuming that difficulty to be got over, what is the next step in the proceedings? The interpleader issue is only an incidental circumstance which does not occur in all cases. By rule 8 of the order the judge may, under the circumstances therein mentioned, dispose of the matter in a summary way, and decide then and there which of the claimants is entitled to the money or other property in dispute. I am disposed to think that, whoever is regarded as a claimant for this sum of 200*l.* for the purposes of the interpleader proceedings, the claim was for the money as winnings under a wagering contract; and that under those circumstances the learned judge, if he would otherwise have been disposed to deal with the matter summarily without directing an issue, was not entitled to do so. It seems to me, if so, to follow that the

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Vaughan Williams L.J.

order for an interpleader issue ought never to have been made. But the order has been made, and the issue has been tried. With regard to half of the sum of 200*l.* paid into court, the plaintiff has taken a course inconsistent with its remaining in the hands of the stakeholders as such. He says that he does not claim that sum of 100*l.* as winnings, but as being the money deposited by the defendant. As soon as he does that, whether he in terms revokes the authority of the stakeholders or not, in substance he does so. Under those circumstances the money has to be dealt with no longer as winnings under the wagering contract, but as money deposited to abide the event of a wager which can be recovered by the person who deposited it on notice to the stakeholder that he claims a return of it. That being so, and the money not being necessary for the support of the bankrupt or his family, it clearly belongs to the trustee in bankruptcy. With regard to the balance of the sum in court, the case appears to me to stand thus. Neither party can claim it as winnings under the wagering contract; but Dawson does not claim it back; and I think that we may treat it as money voluntarily placed by him at the disposal of the bankrupt or the trustee in bankruptcy claiming through him, whichever, as between the two, it may belong to. Under those circumstances I think that we may deal with this money as it is proposed to do by our judgment, and that it must be considered to belong to the plaintiff as the defendant's trustee in bankruptcy. But, as I have already pointed out, our judgment must not be taken to affirm the notion that any person can recover a sum of money by means of interpleader proceedings as being winnings under a wagering contract.

ROMER L.J. I agree. The appeal of the defendant clearly fails, and I have nothing to add with regard to it. The cross-appeal by the plaintiff gives rise to questions of more difficulty, but I agree that it should succeed. This interpleader issue was not between the parties to a wager, but between one of the parties to a wager and a person claiming through him. Rightly understood, this case seems to me to be simply one in which a bankrupt, being entitled, as he says, to a sum of

money which he is able to put into his pocket, raises against his own trustee in bankruptcy the point that he became entitled to this sum of money by virtue of a wagering contract which is void. It is a case in which a bankrupt himself sets up the provisions of s. 18 of the Gaming Act, 1845, for the purpose of allowing him to retain money as against his own trustee in bankruptcy. In my opinion a bankrupt cannot raise such a point against his trustee in bankruptcy. When the circumstances of this case are considered, it seems to me clear that, when the order was made in chambers for the payment of the money into court, and the trial of an interpleader issue, the effect was that the stakeholders treated the money as belonging to the defendant, subject to the question whether it passed from him to some one claiming through him, namely, his trustee in bankruptcy, the plaintiff. Therefore, when the money had been paid into court, it was as if the stakeholders had paid it to the defendant, and a question had afterwards arisen between the defendant and his trustee in bankruptcy to which of them it belonged. I quite agree with what has been said by my brother Vaughan Williams concerning the care which ought to be exercised in directing an interpleader issue, where a stakeholder is dealing with moneys deposited under a wagering contract. I do not think that it would be going too far to say that an issue ought not to be directed where the claimants of the moneys deposited are the parties to the wager, and appear to be trying to get the decision of the Court as to which of them is entitled to the stakes. The present case is not such a case, but one in which the only question is between a bankrupt and his own trustee in bankruptcy, and the former endeavours to set up against the latter the illegality of the title by which he became entitled to the money in question.

Appeal dismissed, and cross-appeal allowed.

Solicitors for plaintiff: *Roscoe & Hincks.*
Solicitors for defendant: *Letts Brothers.*

E. L.

C. A.
1900
July 4.

[IN THE COURT OF APPEAL.]

KING *v.* HUTTON.

Bankruptcy—Broker and Customer—Customer's Speculative Account—Bankruptcy of Broker—Differences due to Customer—Rules of the Stock Exchange—Surplus in Hands of the Official Assignee of the Stock Exchange—Title of Trustee in Bankruptcy.

A broker on the Stock Exchange was officially declared a defaulter. The same day the official assignee, under the Rules of the Stock Exchange, closed all accounts of the broker then open, and received and paid all amounts owing by or to him on the Stock Exchange, and, after payment of all the Stock Exchange liabilities of the broker, there remained a surplus in the hands of the official assignee. Shortly afterwards the broker was adjudicated bankrupt with large outside liabilities. Part of the surplus above mentioned comprised a sum of money which represented differences, being profits, due on contracts made with jobbers on the Stock Exchange by the broker as agent for an outside customer, who was running a speculative account on the Stock Exchange through him, and which the broker, on the day he became a defaulter, had he been then solvent, would have received for the customer. Both the customer and the trustee in bankruptcy of the broker having claimed this sum of money, the official assignee paid it into court under an interpleader summons:—

Held, that the sum of money in question was merely a book-debt of the broker and formed part of his general assets, and therefore passed to his trustee in bankruptcy; and that the remedy of the customer was to prove in the bankruptcy for the amount.

Judgment of Phillimore J., [1899] 2 Q. B. 555, affirmed.

APPEAL from a judgment of Phillimore J., reported [1899] 2 Q. B. 555, where the facts are fully set out.

The defendant Hutton was customer of one Basil Woodd, a broker on the Stock Exchange, and was running a speculative account through him.

On December 28, 1898, there was a balance of 286*l.* 8*s.* 9*d.* due to the defendant on the accounts for differences. On December 30 Woodd was officially declared a defaulter, and the official assignee of the Stock Exchange, in accordance with the Rules of the Stock Exchange, closed all Woodd's contracts then open on the Stock Exchange, including those in which the defendant was interested, and, after receipt and payment of all

amounts owing by or to members of the Stock Exchange, there remained a surplus of about 600*l.* in his hands.

Subsequently Woodd was adjudicated a bankrupt, and the plaintiff was appointed trustee in the bankruptcy.

The defendant claimed to be paid 286*l.* 8*s.* 9*d.* out of the surplus in the hands of the official assignee, and, as the plaintiff as trustee in bankruptcy claimed the whole amount, the official assignee interpleaded as to the above-mentioned sum, which he paid into court. Phillimore J. gave judgment for the plaintiff. (1)

The defendant appealed.

Rufus Isaacs, Q.C., and *Widnell*, for the defendant. The question depends on the true relation between the defendant and Woodd. It is submitted that the relation between a broker on the Stock Exchange and his client is the same for the present purpose as that between any other agent or factor and his principal. When the broker effects a contract with a jobber, by the Rules of the Stock Exchange, they are, as members of the Stock Exchange, principals inter se, but as regards his principal the broker is merely an agent, and a contract is made by him as such between the jobber and the principal. The broker acts like any other agent in a fiduciary capacity, and the money received by him upon a contract which he makes for his client is not merely a debt, but is the property of the client. The fact that by the Rules of the Stock Exchange the broker may be liable as principal to the jobber does not alter his relation to his principal. If a client sells through a broker a particular parcel of stock, and the broker receives the price of it, clearly the amount so received by the broker is the property of the client. It cannot make any difference in law that there have been several transactions, both of sale and purchase, and that for convenience they have been set off in account one against the other. If this money was due to the defendant from Woodd in a fiduciary capacity, it does not form part of Woodd's estate which passes to the trustee in bankruptcy. There is no evidence to shew that by any course of

(1) [1899] 2 Q. B. 555.

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dealing that which would in the ordinary course be the property of the defendant in the hands of his agent Woodd had been converted into a mere debt. The money in the official assignee's hands was money belonging to the defendant, and he is entitled to it as against the assignee in the bankruptcy of Woodd.

[They cited *Beckhuson* v. *Hamblet* (1); *Anderson & Co.* v. *Beard* (2); *Ex parte Cooke, In re Strachan* (3); *Taylor* v. *Plumer* (4); *Hancock* v. *Smith* (5); *Ex parte Boden, In re Wood* (6); *Ex parte Grant, In re Plumbly.* (7)]

Herbert Reed, Q.C., and *Muir Mackenzie*, for the plaintiff. This is not the case of a trust, but simply of a debtor and creditor account. It cannot be supposed that Hutton contemplated that the broker should keep these accounts separate from his other transactions. It would be impossible for the broker to settle with the various jobbers if he had to keep every account separate and could not apply part of one in settlement of another. Phillimore J. points out in his judgment that this is not a case in which a broker has been directed to sell a particular parcel of stock and reinvest in some other named stock. To this latter case different considerations might apply. *Hancock* v. *Smith* (5) was a case of specific sums to be appropriated to a specific purpose.

Widnell, in reply.

A. L. SMITH L.J. This is an interpleader issue between the trustee in bankruptcy of Woodd, a broker on the Stock Exchange, and the defendant, who was a customer of the broker. The real question is whether the relation between the broker and his customer was that of debtor and creditor, or whether the broker was a trustee of the money of the customer in his hands, or which would have come into his hands had he not been declared a defaulter. It has been decided by my brother Phillimore that on the facts of this case

(1) Ante, p. 18.
(2) Ante, p. 260.
(3) (1876) 4 Ch. D. 123.
(4) (1815) 3 M. & S. 562; 16 R. R. 361.
(5) (1889) 41 Ch. D. 456.
(6) (1873) 28 L. T. 174.
(7) (1880) 13 Ch. D. 667.

the relation was that of debtor and creditor. The trustee appeals, and the question is whether that finding of fact of the learned judge is right. The case shewn by the accounts is that the defendant was dealing in numerous transactions with the stockbroker. The accounts shew fortnightly balances, and money paid by the defendant as cover. The balance of one fortnightly account is carried on to the next account. The meaning of this is, not that the broker was a trustee in respect of each item, but that there was a running account, the balance of which was to be paid or received by the defendant as the case might be. It is clearly a debtor and creditor account, and the learned judge was right in saying that the trustee in bankruptcy was entitled to the balance in the hands of the official assignee, and that the defendant must prove in the bankruptcy in respect of the debt due to him. The appeal will be dismissed.

VAUGHAN WILLIAMS L.J. I agree. I assent thus far to the argument on behalf of the appellant: that if we take the case of a stockbroker receiving from his client a sum of money or securities—in the former case for the purchase of stock or shares, and in the latter for the purpose of selling the securities handed over—the broker has only a special property in the moneys or securities handed to him for a specific purpose. Such a case would be like that of a factor who has had goods entrusted to him for sale and has sold them for his principal, but has not received the price. The factor would not have a general property in the money to be received by him, but only a special property, and, if he became bankrupt while the price of the goods was unpaid, that price would not go into the general account in the bankruptcy. This is a very different case, and the accounts between the parties afford evidence to my mind to shew that the broker and his customer did not as between themselves deal with the matter otherwise than as a simple debtor and creditor account. That is the decision of Phillimore J., and it is not necessary to go further than to say that we cannot differ from the conclusion of fact at which the learned judge arrived.

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KING v. HUTTON.

ROMER L.J. I agree, and will only add that, though we have before us only two accounts covering two account days, we know that the transactions between the parties had been going on for a long time, and that it is not suggested that the accounts we have before us were exceptional, or that they did not fairly represent the transactions that had previously taken place.

Appeal dismissed.

Solicitors for plaintiff: *Ellis, Bickersteth & Ellis.*
Solicitors for defendant: *Cheston & Son.*

A. M.

1900
May 29;
June 12.

In re LANE-FOX.
Ex parte GIMBLETT.

*Bankruptcy—Voluntary Settlement—Discretionary Trust to pay future Debts—Intent to Defeat and Delay future Creditors—*13 *Eliz. c.* 5.

A voluntary settlement, honestly entered into at the time it is made, all then existing debts being paid, and the settlor retaining an income sufficient for reasonable and probable requirements, ought not to be treated as fraudulent and void under the statute 13 Eliz. c. 5, merely because some years afterwards it has the effect of defeating or delaying the subsequent creditors of the settlor.

In 1891 A., a few days after attaining twenty-one, executed a voluntary settlement whereby she vested the whole of her property in trustees with an absolute discretionary trust to apply either capital or income in payment of any of her then existing or future debts; and a further discretionary trust to apply the income during her life for the benefit of herself or any husband or children. The deed contained a power for A. to revoke the settlement with the consent of her trustees. The few debts she had at the date of the settlement were paid out of cash in hand. On two subsequent occasions A. executed partial revocations of the settlement, and portions of the settled funds were applied by the trustees in payment of her debts; but the trustees refused a third time to pay her debts, and thereupon, in February, 1900, she was adjudicated bankrupt, having no assets except the settled property:—

Held, that the settlement was not fraudulent and void under 13 Eliz. c. 5, as against her trustee in bankruptcy.

THIS was an application by the trustee in bankruptcy, and raised the question whether a voluntary settlement, executed

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by the bankrupt in the year 1891, was fraudulent and void under the statute 13 Eliz. c. 5, under these circumstances.

Miss Lane-Fox was left an orphan in 1870, and was brought up by her guardian, the Rev. R. W. Cracroft. She attained her majority on January 25, 1891, and thereupon became absolutely entitled under certain settlements to about 15,000*l.* Five days afterwards, under the advice of her guardian, she executed a voluntary settlement of all her property. The deed was dated January 30, 1891, and was made between Miss L. E. Lane-Fox of the one part, and the Rev. R. W. Cracroft and the Rev. C. H. Fairfax of the other part, and thereby, after reciting that Miss Lane-Fox was desirous of settling her property in the manner thereinafter expressed, and that Cracroft and Fairfax had at her request agreed to be the trustees of the intended settlement, it was witnessed that Miss Lane-Fox as beneficial owner conveyed to Cracroft and Fairfax all her property, as scheduled, upon trust to invest; and in the first place, out of any moneys whether by way of capital or income coming to their hands, to pay to Miss Lane-Fox the sum of 500*l.*, and also out of such moneys whether capital or income to pay such of the debts, if any, of Miss Lane-Fox as were then or might at any time thereafter be due by her as they in their absolute discretion might think fit; and, further, during the life of Miss Lane-Fox, in their or his absolute and irresponsible discretion, to pay and apply the whole or any part or parts of the income of the trust premises and of the investments representing the same as and when the same income should be received, and without anticipation, to or for the benefit of Miss Lane-Fox for her life, or for the benefit of any husband or children; and from time to time to invest any income as should not be so paid to or for the benefit of Miss Lane-Fox or any husband or children as forming part of the capital moneys thereby settled, but with power nevertheless at any time or times, at the discretion of the trustees or trustee, to resort to any such investments as last aforesaid, and apply the same or any part thereof to or towards any of the objects and purposes of the last preceding trust; and from and after the death of Miss Lane-Fox to stand possessed of the trust premises and

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of the income thereof in trust for her children as she should by deed or will appoint; and in default of such appointment upon usual trusts for her children at twenty-one or marriage; and in default of children upon trust for such person or persons as she should by deed or will appoint; and in default of such appointment upon trust for her statutory next of kin; and it was thereby provided that it should be lawful for Miss Lane-Fox at any time or times thereafter with the consent of the trustees or trustee for the time being to revoke all or any of the trusts declared by the settlement of and concerning the trust funds, or any part thereof, and to declare any new or other trusts of or concerning the same, and that the trustees might give or withhold their or his consent to any such revocation and new appointment as aforesaid at their absolute discretion, and without being answerable for the exercise of such discretion.

In 1892 and in 1897 Miss Lane-Fox with the consent of her trustees executed partial revocations of the settlement, and trust funds to about 7000*l.* were sold out by the trustees and applied in payment of debts. In 1899 Miss Lane-Fox was again in debt to the amount of about 730*l.*, but the trustees refused to concur in any further revocation of the settlement, or to apply any portion of the income in payment of these debts. Thereupon, in February, 1900, Miss Lane-Fox was adjudicated bankrupt on her own petition, having no assets whatever other than the property comprised in the settlement. A Mr. Gimblett became the trustee in her bankruptcy, and now moved the Court for a declaration that the settlement was void under s. 47 of the Bankruptcy Act, 1883. It appeared, however, from the evidence, that the few debts the bankrupt had at the date of the settlement were paid at the time out of cash retained for the purpose and not included in the settlement, and thereupon the motion was by leave of the Court treated as an application under the statute 13 Eliz. c. 5.

Muir Mackenzie, for the motion. The settlement was obviously made to defeat, delay, or hinder future creditors. It is an attempt made by an owner of property to place it in such a position as shall prevent her creditors, or trustee in bank-

ruptcy, from taking it and using it for the payment of her debts: *Mackintosh* v. *Pogose*. (1) In the case of *In re Tetley* (2) Vaughan Williams J. says: "In the case of a voluntary settlement, however honestly the settlor may execute it, however little he may be thinking of his creditors at the time he executes it, however free he may be from any desire to defeat or delay his creditors, the settlement, if voluntary, is void as against creditors if its necessary tendency is to defeat and delay them." That statement completely covers this case. Here the inference is irresistible that the necessary tendency of the settlement is to defeat future creditors: *Freeman* v. *Pope*. (3) The discretionary trust to pay future debts, the power to accumulate income and the power of revocation, shew the intention with which the settlement was executed. The trustee in bankruptcy asks that the settlement may be set aside so far as may be necessary to pay the debts: *In re Sims*. (4) At any rate, the trustee is entitled to have the 500*l*. raised and paid to him.

Mellor, for the bankrupt, asked that her debts might be paid out of the settled funds.

Reed, Q.C., and *Carrington*, for the trustees of the settlement. Although the trustee may now be willing to pay the debts, it is insisted that the settlement is good. Whether a voluntary deed is or is not void under the statute is a question of fact in each case—that is to say, whether the intention at the time was to defraud creditors: *Thompson* v. *Webster* (5); *Freeman* v. *Pope* (3); *In re Wise*. (6) The deed is a common form, and there is no direct decision on the point. Under all the circumstances there was no intention here at the time to defraud future creditors. It was a proper and prudent settlement for a young person in the position of the bankrupt to make. No order should be made as to the 500*l*. The trustees may be able to shew at the proper time that the bankrupt has had the benefit of that sum.

Muir Mackenzie, in reply.

(1) [1895] 1 Ch. 505, 514.
(2) (1896) 3 Man. 226, 233.
(3) (1870) L. R. 5 Ch. 538.
(4) (1896) 3 Man. 340.
(5) (1859) 4 Drew. 628.
(6) (1886) 17 Q. B. D. 290.

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WRIGHT J. This is a somewhat remarkable case. The trustee in the bankruptcy of Miss Lane-Fox seeks to have it declared that as against him a settlement which she made upon trusts for her own benefit in 1891 is to be treated as void. One of the curious circumstances of the case is that the bankruptcy is a bankruptcy upon the petition of the lady herself, and her object in making herself bankrupt was to get rid of this settlement, for what reason I need not inquire, whether it is her dislike to her trustees, or her desire to pay her debts, or to get control of her money; but the question is, whether this settlement ought to be treated as void or voidable against the trustee. He based his case in the first instance on s. 47 of the Bankruptcy Act, 1883, which, however, turned out to have no application whatever, because at the time the settlement was made the lady had in point of fact enough money to pay her debts without the aid of the property comprised in the settlement, and the settlement was more than two years old. Then by leave of the Court the application has been turned into one that the settlement is to be treated as void under the statute of Elizabeth, or the common law which that statute re-stated. It seems to me that the law on the subject is this—that in a case like the present one, where there are no existing creditors at the date of the settlement for whom sufficient provision did not remain outside the settlement, it is necessary in order to avoid the settlement to shew that there was an actual intention to defeat, delay, or hinder future creditors. I think that the law is, perhaps, best laid down in the judgment of Lord Westbury, a great authority in these matters, in the case of *Spirett* v. *Willows* (1), where he lays down two propositions, the first of which has been questioned by Lord Hatherley in *Freeman* v. *Pope* (2) as being too wide, but the other has not been questioned, so far as I am aware. The first proposition, which has been deemed to be too wide, is this—I am reading from the *Law Journal* (3): "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shewn that the remedy of the

(1) (1864) 3 De G. J. & S. 293, at p. 367. (2) L. R. 5 Ch. 538.
(3) 34 L. J. (Ch.) 365.

creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." That has been thought too wide. It does not apply here, because the creditors here were not creditors at the date of the settlement. But then comes this passage: "But if a voluntary settlement or deed of gift is impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to shew either that the settlor made the settlement with the express intent 'to delay, hinder, or defraud' creditors, or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with the intent 'to delay, hinder, or defraud' creditors, and is therefore fraudulent and void." I think no decision can be found anywhere inconsistent with the proposition that an honest settlement, affirmatively proved to be honest, ought not to be set aside merely because some years afterwards it is proved to have the effect of defeating and delaying subsequent creditors. Here the case was one of an inexperienced and probably impulsive young woman, just come of age, possessed of considerable means—some 15,000*l.*, I think—which through one accident or another had come into her control without being under the protection of any settlement or of any trustee. Under those circumstances her friends and relations most properly, most wisely, and most prudently prevailed upon her, and she most properly, wisely, and prudently consented, that the money should be put into a kind of settlement. Everything was open, everything was in the ordinary form, and in perfect good faith, and to my mind it is affirmatively proved that this was a perfectly honest arrangement, and it is proved before me that there were no debts at the time beyond the amount of the moneys which were in hand to meet them. I think it would be outrageous if a settlement of such a description were to be set aside because afterwards the lady turns out to have become more extravagant than was supposed. Not merely were there no existing debts unprovided for at the time, but there was no

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reason to apprehend any future embarrassment. The income which she would derive under the settlement would be sufficient for all the probable expenses of a young girl of that class, and who might be supposed to be unlikely to wantonly throw away her means. She had no intention of trading, nor is there any circumstance to shew that she is within one or other of the very few exceptions which have been established under the general rule as laid down in such cases as *Spirett* v. *Willows* (1) and *Freeman* v. *Pope*. (2) I think all the cases that have been cited are consistent with what I have said, but perhaps the language of the Court of Appeal in the case of *In re Wise* (3) is as strong as any. To the same effect was Kindersley V.-C.'s judgment as far back as the case of *Jenkyn* v. *Vaughan* (4), and I think there are many other similar cases. To my mind the application of the trustee in bankruptcy fails, but it is a case in which I cannot say that he was wrong to investigate the matter. If he had made his application in proper form I do not think he ought to have been made to pay any costs; but here he based his application upon s. 47 of the Act of 1883, and he has no evidence to sustain his case under that section, and I think, as he obtained leave to amend only on terms as to costs remaining in my discretion, he ought to pay the costs of this application; but nothing that I have said will affect any question being raised hereafter as to the 500*l.*

Solicitors for trustee in bankruptcy: *Colyer & Colyer.*
Solicitors for settlement trustees: *Darley & Cumberland.*
Solicitor for Miss Lane-Fox: *F. C. Sydney.*

(1) 3 De G. J. & S. 293.
(2) L. R. 5 Ch. 538.
(3) 17 Q. B. D. 290.
(4) (1856) 3 Drew. 419.

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1900
July 3.

IREDALE AND ANOTHER *v.* CHINA TRADERS INSURANCE COMPANY.

Ship—General Average—Sacrifice of Freight.

Shippers chartered a ship to carry a cargo of coals from Cardiff to Esquimault. In the course of the voyage the coal heated to such an extent that if the ship had continued her voyage the ship and cargo would have been totally lost. The master, for the safety of all concerned, put into a port of refuge and landed the coal, which was subsequently surveyed and found to be in such a condition as to be incapable of being carried with safety to its destination. The master accordingly abandoned the voyage, and the chartered freight was lost:—

Held, that the freight had not been sacrificed under such circumstances as to make the loss the subject of general average contribution.

Judgment of Bigham J., [1899] 2 Q. B. 356, affirmed.

APPEAL from the judgment of Bigham J., reported [1899] 2 Q. B. 356, at the trial without a jury upon the following agreed statement of facts.

The plaintiffs own the iron ship *Lodore*, and by charter dated February 10, 1897, chartered her to load coals at Cardiff for Esquimault at 19*s.* 9*d.* per ton delivered. By a policy dated March 3, 1897, they insured the chartered freight thereunder, valued at 1650*l.*, with the defendants, against, inter alia, loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight.

The *Lodore* proceeded to Cardiff and there loaded a full cargo of coals, and sailed on March 29, 1897, on the insured voyage. On May 26, 1897, the coals began to heat, and the master decided, for the safety of the ship, freight, and cargo, to jettison cargo and to bear up for the river Plate. About forty tons were jettisoned, and the *Lodore* subsequently anchored in Buenos Ayres Roads on May 29, 1897. Between that date and June 25, 1897, cargo was from time to time discharged, and various surveys were held upon the coals, and it was found that the coals continued hot and would heat still further if the

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voyage was proceeded with. Accordingly, on June 25, 1897, the coals were condemned, and were ultimately sold. The vessel abandoned her voyage to Esquimault and returned to the United Kingdom with another cargo, and the chartered freight was totally lost.

It was necessary for the safety of the whole adventure for the vessel to put into Buenos Ayres as aforesaid, and it was reasonably certain that if she had continued on her direct voyage the temperature of the coal would have continued to rise until spontaneous combustion ensued, and that, had she so continued her voyage, the ship and cargo would have been destroyed by fire before reaching Esquimault. When and while she was at Buenos Ayres the ship and her cargo, both the portions landed and the portion remaining on board, were in safety, but after she reached Buenos Ayres no part of the cargo could have been reloaded $\frac{\text{and}}{\text{or}}$ carried with safety to Esquimault in the same or another bottom, and it was all necessarily and properly sold at Buenos Ayres.

The policy and charterparty, the protest dated August 11, 1897, and the average statement dated March 15, 1898, with the survey reports as therein set out, may be referred to as parts of this special case.

This action, in the defence to which all underwriters interested similarly to the defendants concur, is defended to test the question whether, by way of set-off and deduction from the total loss on the policy, which is admitted, the defendants are entitled to have the said loss of freight made good in general average to any and what extent, and to deduct the contribution to the same falling on the plaintiffs as shipowners, from the amount due on the policy.

It is not intended to allege or rely on improper condition of cargo as a defence to any claim there may be.

The Court is to have power to draw all necessary inferences of fact, and the parties agree to leave the adjustment of figures on such principle as may be laid down to an average adjuster.

The learned judge gave judgment for the plaintiffs. (1)

The defendants appealed.

(1) [1899] 2 Q. B. 356.

June 21. *Carver, Q.C.*, and *Scrutton*, for the defendants. At the time when the captain decided to make for Buenos Ayres it did not appear that the earning of the freight was hopeless. The learned judge does not find that the captain knew that in what he did he was only giving up that which was worthless, and that the freight was irretrievably lost at that time. The matter must be looked at in such cases as it appeared at the time when the alleged average act took place; if at that time something which there is hope of saving is voluntarily sacrificed for the general benefit, the case is one for general average contribution. The abandonment of the voyage and consequent sacrifice of the freight must be dated back to the act of the captain in making for Buenos Ayres, for it followed from that act.

[They cited *Shepherd* v. *Kottgen* (1); *Pirie* v. *Middle Dock Co.* (2); *Columbian Insurance Co.* v. *Ashby* (3); *The Knight of St. Michael* (4); *Anglo-Argentine Live Stock and Produce Agency* v. *Temperley Shipping Co.* (5); *Atwood* v. *Sellar & Co.* (6)]

Joseph Walton, Q.C., and *J. A. Hamilton*, for the plaintiffs. The simple answer to the defendants' contention is that the freight was lost, not by reason of a general average sacrifice, but because the cargo of coal had heated, and was therefore unfit to be reshipped at Buenos Ayres. There can be no general average sacrifice of a thing that is already lost and beyond all hope of being saved. The freight was not lost in consequence of the captain's putting into Buenos Ayres, for it was, as now appears, lost when he decided to do so. He acted for the immediate security of the ship and cargo, and in order to see if the voyage could be carried on with safety; and no doubt the expense of putting into that port would be a general average loss. But he certainly did not abandon the voyage and freight when he made for Buenos Ayres. He put in there for the purpose of saving the freight if possible. The claim is in respect of freight

(1) (1877) 2 C. P. D. 585.
(2) (1881) 44 L. T. 426.
(3) (1839) 13 Peters, 331.
(4) [1898] P. 30.
(5) [1899] 2 Q. B. 403.
(6) (1879) 4 Q. B. D. 342; (1880) 5 Q. B. D. 286.

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lost by fire, one of the perils insured against. The defendants admit the right of the plaintiffs to recover under that claim, and yet counter-claim for general average as though there had been a loss by voluntary sacrifice. This is inconsistent. In order that there may be a general average sacrifice, there must be a common peril when the sacrifice takes place. In this case there was no common peril when the voyage was really abandoned. The ship and cargo were then in safety at Buenos Ayres. A peril to the common adventure will not suffice.

[They cited *Svensden* v. *Wallace* (1) and *Walthew* v. *Mavrojani*. (2)]

Carver, Q.C., in reply. There is no inconsistency between the admission of the claim and the setting up of the counter-claim, since the real dispute is between the underwriters on ship and the underwriters on freight. The motive for putting into Buenos Ayres was to secure the general safety, and everything involved as a consequence of so doing is a sacrifice. The abandonment of the voyage was a consequence of the captain's election to turn off to Buenos Ayres.

Cur. adv. vult.

July 3. The judgment of the Court (A. L. Smith, Vaughan Williams, and Romer L.JJ.) was read by—

A. L. SMITH L.J. This is an action by shipowners upon a policy of marine insurance by which the defendants underwrote for the plaintiffs the chartered freight of coals, valued at 1650*l.*, upon a voyage from Cardiff to Esquimault in the plaintiffs' ship *Lodore*, and the perils insured against were "loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight."

It is not disputed by the defendants that the chartered freight was lost by reason of the perils insured against within the meaning of the policy (*The Knight of St. Michael* (3)), and that for this loss the defendants are liable to the plaintiffs. But the defendants contend that upon the facts of this case there has been a general average loss which is the subject of

(1) (1884) 13 Q. B. D. 69. (2) (1870) L. R. 5 Ex. 116.
(3) [1898] P. 30.

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a general average contribution payable by the plaintiffs, and that for the amount of this contribution the defendants are entitled to have credit given to them when they pay to the plaintiffs the amount recoverable under the policy.

The question argued before us was whether, as regards the coal, upon the delivery of which at Esquimault the freight would have become payable, there has been a general average sacrifice which would form the subject of a general average contribution, and, as this was the only point taken or argued, I pass on without observing upon the form in which the question is raised. My brother Bigham has held that the defendants' contention is ill-founded, and they appeal.

It has long since been established that to constitute a general average loss so as to be the subject of a general average contribution, two things at least must co-exist: (*a*) there must be an intentional sacrifice of part of the ship or cargo, or a voluntary expenditure for the benefit of the ship and cargo; (*b*) such sacrifice or expenditure must be made at the time when a common danger to ship and cargo existed, for when the common danger has ceased there can be no sacrifice or expenditure that can be the subject of a general average contribution. Bowen L.J. in *Svensden* v. *Wallace* (1) thus expresses himself as to what constitutes a general average sacrifice. He says: "It is essential at the outset to bear in mind two things, the nature of every general average sacrifice, and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo." The sacrifice must be "made for the common safety in a time of danger." What the learned Lord Justice here says about a general average sacrifice is only what will be found laid down in many cases and stated in the text-books of authority, though clothed in different language. We have nothing in this case to do with any expenditure, for it is not suggested that there has been any. What we have to consider is whether there has been a general average sacrifice of cargo, so as to be the subject of a general average contribution by the

(1) 13 Q. B. D. 69, at p. 84.

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owner of ship and freight. It is said by the defendants that there was a general average sacrifice of the coal when the ship turned off her course and bore up to the river Plate, followed, as it was, by an abandonment of the voyage after the ship arrived at Buenos Ayres. To appreciate this argument it seems to me important to consider—first, the position of matters and what took place when the captain of the ship determined to bear up for the river Plate; and, secondly, what took place after the ship's arrival there. The admitted facts are that upon May 26, 1897, when the ship was on her voyage from Cardiff to Esquimault, the coals began to heat and the master decided, "for the safety of the ship, freight, and cargo, to bear up for the river Plate." I leave out of consideration the forty tons of cargo which were jettisoned, for no question now arises thereon. I do not doubt that the bearing up under the circumstances above mentioned for the river Plate was a general average act, which would have given rise to a general average contribution if, in consequence of such act, any expenses or loss to the cargo were thereby occasioned. But no question of expenses arises, for none were incurred, and there was no loss to the cargo thereby occasioned. In these circumstances, how can it be said that the bearing up for the river Plate was a general average sacrifice as regards the cargo, so as to be the subject of a general average contribution? No part of the cargo was in fact sacrificed, and a fortiori there was no general average sacrifice so as to be the subject of a general average contribution. For the defendants it was argued that the voyage was abandoned when the captain decided to bear up for the river Plate, but in my judgment it clearly was not. The master bore up for the river Plate and went into Buenos Ayres for the purpose, if possible, of continuing the voyage after he had got the cargo in order. He did not bear up for the river Plate for the purpose of abandoning the voyage. That was wholly foreign to his purpose. The bearing up for the river Plate was no abandonment of the voyage at all, and it is wholly erroneous to say that it was. Now the ship with the coals on board—other than those jettisoned—arrived at Buenos Ayres on May 29, 1897, and remained there till June 25, 1897,

on which day the coals were condemned and ultimately sold. The admission is that "when and while the ship was at Buenos Ayres the ship and her cargo were in safety." The sale of the cargo, which, in my opinion, constituted the abandonment of the voyage, was not a general average sacrifice which forms the subject of a general average contribution, for the common danger had ceased, and the ship and cargo had then been in safety for about a month. The suggestion that the sale of the coal at Buenos Ayres was made for the common safety of ship and cargo to enable the vessel to bring her voyage and the common adventure to a successful issue will not assist the defendants, for, as was pointed out by Bowen L.J. in *Svensden* v. *Wallace* (1), a sacrifice for the safety of the common adventure does not constitute a general average sacrifice according to the law of England; nor, indeed, was it argued that it did. What was argued for the defendants was that there had been a general average sacrifice of cargo when the ship bore up for Buenos Ayres, and at that time there was a common danger. I agree that then there was a common danger, but then there was no general average sacrifice of cargo. I am of opinion that there has been no general average sacrifice in this case, and consequently the right to a general average contribution never arose, and that this appeal must be dismissed with costs. I agree with Bigham J.'s inference of fact that at Buenos Ayres the coal was hopelessly lost.

Appeal dismissed.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

(1) 13 Q. B. D. 69, at p. 85.

A. M.

1900
June 14.

CHRISTIE, MANSON & WOODS, Appellants *v.* COOPER, Respondent.

Trade-mark—Offence of Selling Goods to which false Trade-mark is applied—Acting innocently—Merchandise Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2, *sub-s.* 2.

Sect. 2, sub-s. 2, of the Merchandise Marks Act, 1887, provides that a person selling goods to which a forged trade-mark is applied is guilty of an offence against the Act unless he proves that, having taken all reasonable precautions, he had no reason to suspect the genuineness of the trade-mark "or that otherwise he had acted innocently":—

Held, that a person who had reason to suspect the genuineness of the trade-mark might nevertheless have acted innocently in selling goods to which the trade-mark was applied, and might, therefore, be exonerated under this sub-section.

Case stated by a metropolitan magistrate.

An information was preferred by William Cooper, the respondent, against Christie, Manson & Woods, the appellants, for that they did on January 11, 1900, unlawfully sell certain china goods to which forged trade-marks were applied, contrary to the Merchandise Marks Act, 1887, s. 2, sub-s. 2.

The material facts of the case were as follows:—

The King of Saxony is entered on the register of trade-marks as proprietor of a certain trade-mark, No. 1137 in class 16, in respect of various kinds of china, and the registration is still in force. The London agents of the Royal Factory at Dresden are Messrs. Oppenheim.

On January 9 and 10, 1900, Messrs. Christie, Manson & Woods exposed at their auction rooms for sale certain china goods advertised to be sold by them on January 11 by order of the executors of a deceased gentleman, and described as lot 71. These goods, which were the subject of this information, were described in the catalogue as Dresden china and were in the White Dresden style, and had affixed to them marks resembling and being good imitations of the trade-mark No. 1137 in class 16; but the magistrate found as a fact that the goods were not genuine Dresden china, and that the marks were

forged trade-marks within the meaning of the Merchandise Marks Act, 1887.

On the morning of January 11 a telegram was sent by the solicitors to Messrs. Oppenheim to Messrs. Christie, Manson & Woods, and was received by the latter in time to admit of full examination of the goods in question. The telegram was as follows: "Referring your letter 12 July 1898 lot 71 to-day's sale believed not genuine. Writing."

The letter of July 12, 1898, referred to in this telegram was part of a correspondence which had taken place between Messrs. Oppenheim's solicitors and Messrs. Christie, Manson & Woods, and contained the following passage:—

"All things sold by us are placed on view for two days preceding the sale, and our rooms are open to all, so that the Dresden factory's agents are at liberty to inspect every piece of china. Though we are quite ready to assist in stopping forgeries, we cannot undertake to be responsible in any way for the various articles that pass through our hands. Yours faithfully, Christie, Manson & Woods."

After the receipt of the telegram the goods in question were examined by a member of the firm of Christie, Manson & Woods specially conversant with china, and he informed Mr. Anderson, the member of the firm who was about to conduct the sale, that he should advise the lot in question being sold "for what it is," as the goods had to be sold without reserve.

Mr. Anderson thereupon made a memorandum on his own sale catalogue by running his pen through the word "Dresden," and on lot 71 being reached he said to the assembled bidders: "Our attention has been drawn to this lot, and we sell it for what it is. You see what there is. What shall we say for it?" Bidding thereupon proceeded in the usual manner, and the lot was knocked down to Mr. William Cooper, the respondent. Mr. Anderson in his evidence before the magistrate stated that the expression he used would naturally raise suspicions in the minds of intending purchasers, and would be so understood by all dealers and persons in the habit of buying at auctions. The articles comprised in lot 71 had been described in the catalogue by a person employed by Messrs.

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Christie, Manson & Woods as an expert in china, who at the time he so described them believed them to be Dresden and the marks upon them to be genuine, but no attempt was made by Messrs. Christie, Manson & Woods at the hearing to uphold his view.

By the fifth of the conditions of sale, which were made part of the case, it was provided, "The lots to be taken away and paid for whether genuine and authentic or not, with all faults and errors of description . . . . Messrs. Christie, Manson & Woods not being responsible for the correct description, genuineness, or authenticity of, or any fault or defect in, any lot, and making no warranty whatever."

The magistrate found as a fact that Messrs. Christie, Manson & Woods had sold goods to which a forged trade-mark had been applied, and that they had not proved to his satisfaction that, having taken all reasonable precautions against committing an offence against the Act, they had no reason to suspect the genuineness of the trade-mark, and he accordingly held that they had not "acted innocently" under s. 2, sub-s. 2 (*c*), although they had not been guilty of any intention to mislead or to induce persons to purchase that which they would not otherwise have purchased. It was then submitted on their behalf that they were protected by s. 2, sub-s. 2 (*c*), if they had been innocent of any intention to induce a buyer to purchase something which he would not otherwise have purchased; but the magistrate was of opinion that, since the object of s. 2, sub-s. 2, was to prevent the sale of goods to which any forged trade-mark is applied, Messrs. Christie, Manson & Woods could not rely on sub-s. (*c*) as a defence unless they had been innocent of any knowledge or reasonable ground of suspicion at the time of sale that the trade-mark was in fact forged, and that their state of mind towards the purchaser was immaterial for this offence. He accordingly convicted them, and stated this case for the opinion of the Court. (1)

(1) By the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, sub-s. 2, "Every person who sells, or exposes for, or has in his possession for sale . . . . any goods or things to which any forged trade-mark or false

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Moulton, Q.C. (*Horace Avory* with him), for the appellants. The appellants come within s. 2, sub-s. 2 (*c*). They acted bonâ fide, and put the purchaser of the lot in the same position as they were themselves, giving him the same information that they had. The telegram was so vague that it did not constitute a reason for suspecting the genuineness of the trade-mark; but even if it did, the appellants shew by their conduct that they had acted innocently.

[He was stopped.]

Israel Davis, for the respondent. The Act was passed for the protection of trade-marks, not for that of purchasers of goods. Any one selling an article which bears a forged trade-mark commits an offence against the Act. It is not necessary for the prosecution to shew that such a person acted fraudulently. The onus is on the defendant to shew that he took all precautions and acted innocently. The innocence which alone can avail the defendant must be innocence of any intention to infringe the provisions of the Act, and it is quite immaterial that the defendant had no fraudulent intention. Sect. 2, sub-s. 2 (*c*), only applies where the false trade description is applied upon the occasion and as part of the terms of sale, and sub-ss. (*a*) and (*b*) relate to such a case as the present, where the forged trade-mark or false trade description is already stamped upon the goods: *Coppen* v. *Moore* (*No.* 2). (1) The other kind of innocent action referred to in sub-s. (*c*) must be something of the same nature as the excuses given by sub-s. (*a*). Where a defendant has not taken all reasonable

trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves,

"(*a*) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description; and

"(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

"(*c*) that otherwise he had acted innocently;

be guilty of an offence against this Act."

(1) [1898] 2 Q. B. 306.

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precautions, and has reason to suspect the genuineness of the trade-mark, it is impossible that he should be able to prove that he has acted innocently: *Wood* v. *Burgess*. (1) A person dealing in an article which bears a forged trade-mark is committing a dangerous action, because he is putting it in the power of other people to sell the goods as if the trade-mark were genuine: *Johnston* v. *Orr Ewing*. (2)

Moulton, Q.C., was not called upon to reply.

GRANTHAM J. In this case we think the learned magistrate came to a wrong conclusion. He says that in his opinion the words of the section, "acted innocently," only apply to innocence of all doubt as to whether the article was genuine or not. We think that this is wrong, and it seems only necessary to read the sub-section to see that it is so. Sect. 2, sub-s. 2 (*a*), says that it is to be one ground for exoneration if the person charged can prove that, having taken all reasonable precautions against committing the offence, he had no reason to suspect the genuineness of the article or trade-mark; but sub-s. (*c*) says that the offender may shew that "otherwise he had acted innocently." That is an expression much wider in its significance than the language of sub-s. (*a*), and it cannot be that it means only the same thing.

It seems to have been practically admitted before the magistrate that the trade-mark was not genuine, and Messrs. Christie, Manson & Woods no doubt told the purchasers at the sale that there was a doubt as to the genuineness of the articles sold in this particular lot, and that they did not guarantee it, but sold the articles for what they were worth. The magistrate has held, however, that this was not sufficient, and that they cannot be said to have acted innocently unless they can shew that they were free from all suspicion as to the genuineness of the article.

The Act, no doubt, is drawn widely for the purpose of stopping the sale of articles bearing false descriptions and false trade-marks. It does not throw on the prosecution the onus of shewing that the person who is charged with the commission

(1) (1889) 24 Q. B. D. 162. (2) (1882) 7 App. Cas. 219.

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Grantham J.

of the offence acted fraudulently, but it shifts that onus from the prosecutor to the vendor of the goods, and it allows that vendor to shew that he has "acted innocently" either because he had taken all reasonable precautions and had no reason to suspect the genuineness of the article or trade-mark (sub-s. 2 (*a*)) or otherwise (sub-s. 2 (*c*)). In my opinion Messrs. Christie, Manson & Woods, although they could not shew that they had no reason to suspect the genuineness of the trade-mark, still are able to shew that they acted innocently. On it being brought to their attention that there was a doubt as to the genuineness of the article, they communicate that doubt to the purchaser, and sell the article for "what it is." Their action was bonâ fide, and it seems to me that they ought not to have been convicted. It is quite true that the magistrate has not gone into the question of whether they could shew their innocence on other grounds, but he has found that, as they were not without reason to suspect the genuineness of the trade-mark, they could not have acted innocently. In so holding he was wrong, and the conviction must be quashed.

CHANNELL J. I agree that the view taken by the learned magistrate is incorrect. The point of this case is as to the meaning in sub-s. 2 (*c*) of s. 2 of the Merchandise Marks Act, 1887, of the word "innocently." That is really the point of law on which the whole case turns.

The construction of this particular Act of Parliament was carefully considered in the case of *Coppen* v. *Moore* (*No.* 2) (1), and the interpretation put upon it, as I understand the judgment in that case, was this: that whereas in the great majority of criminal cases it is necessary for the prosecution to prove a mens rea, that is not necessary in prosecutions under this Act. But, on the other hand, this is not one of those cases where, it being the object of the Legislature to forbid a particular act from being done at all, the statute is so framed as to forbid the commission of the act absolutely, quite independently of any question of mens rea, and where consequently, however

(1) [1898] 2 Q. B. 306.

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innocently the forbidden act is done, the person doing it must be convicted, although he had no mens rea at all.

A prosecution for an offence under this Act does not fall under either of those categories. In such an offence there must be a mens rea in fact; but the burden of proof of it is shifted, and is not in accordance with the ordinary rules and principles of criminal law—that is to say, the prosecution have not got to prove a mens rea; but if the defendant is able to prove an absence of any mens rea, then he is to be acquitted. That is the construction that was put upon this Act of Parliament after very careful consideration by a Court composed of an unusually large number of judges in *Coppen* v. *Moore* (*No.* 2) (1), and that is what we have to apply to this case. It still leaves us to consider what is the meaning of the words in sub-s. 2 (*c*), "acted innocently"; but the question really is whether Messrs. Christie, Manson & Woods are able to prove the absence of such mens rea as would in an ordinary case, where the burden of proving its existence is on the prosecution, be sufficient to establish the charge.

The magistrate has held that they could not be said to have acted innocently unless they could shew that they had been innocent of any knowledge or reasonable ground of suspicion at the time of the sale that the trade-mark was in fact a forged trade-mark. That cannot be right, for, as pointed out by my brother Grantham, that is the gist of sub-s. (*a*), and sub-s. (*c*) goes on to say "that *otherwise* he had acted innocently." That assumes that there must be other cases of innocence beside absence of knowledge or of suspicion. The result is, as it seems to me, that it is open to the defendant to set up, under sub-s. (*c*), any absence of mens rea. It seems to have been contended before the magistrate that the state of mind of the seller to the purchaser was material as regards a prosecution for this offence, and that in order to establish his innocence it was sufficient for him to shew that he did not intend to defraud the purchaser. That seems to me to have been a false point. The innocence contemplated by the Act is innocence of any

(1) [1898] 2 Q. B. 306.

intention to infringe the Act of Parliament, and that is the point which, I think, the magistrate ought to have considered. It seems to me quite clear that there may be innocence of any intention to infringe the Act, even although there may be suspicion of the genuineness of the article or trade-mark. That is what the word "*otherwise*" means, as I think. That being so, it seems to me that the decision of the magistrate proceeded on a wrong ground.

The only point in which there is some difference between my brother Grantham and myself is this. I feel some doubt whether we ought to simply quash the conviction, or whether we ought not to send the case back to the magistrate that he might consider again, applying the right test and not the wrong test, the question whether Messrs. Christie, Manson & Woods had proved that they had otherwise acted innocently; but as my brother Grantham takes the view that it is better simply to quash the conviction, I do not dissent. I have expressed my view of the meaning of the section, and that will be sufficient in any future cases upon it.

Conviction quashed.

Solicitors for appellants: *Eardley, Holt, Hulbert & Hubbard.*
Solicitors for respondent: *Halses, Trustram & Co.*

A. P. P. K.

C. A.
1900
July 10.

[IN THE COURT OF APPEAL.]

BEARD *v.* LONDON GENERAL OMNIBUS COMPANY.

Master and Servant—Negligence of Servant—Omnibus driven by Conductor—Onus of proving Authority.

At the end of a journey the conductor of an omnibus belonging to the defendants, in the absence of the driver, and apparently for the purpose of turning the omnibus in the right direction for the next journey, drove it through some by-streets at a considerable pace, and while so doing negligently ran into and injured the plaintiff. At the trial the plaintiff gave no evidence that the conductor was authorized by the defendants to drive the omnibus in the absence of the driver. At the close of the plaintiff's case judgment was entered for the defendants. On appeal:—

Held, by A. L. Smith and Romer L.JJ., that the plaintiff had not discharged himself from the burden cast upon him of shewing that the injury was due to the negligence of a servant of the defendants acting within the scope of his employment, and that the defendants were entitled to judgment.

By Vaughan Williams L.J., that in general, if, in the absence of the driver of an omnibus, an accident occurs while the conductor is driving, it would be for the proprietor to shew that the act was unauthorized, but that the facts of the particular case negatived the giving of authority, and that the defendants were entitled to retain the judgment.

Appeal from a judgment of Lawrance J.

The plaintiff brought an action against the defendants to recover damages in respect of injuries sustained by him through the negligent driving of one of their servants. It appeared that one of the defendants' omnibuses, sent out in charge of a driver and conductor, arrived at Battersea Rise, which was the terminus of the journey. The driver got off the box of the omnibus, leaving the omnibus at a place where there was a stand for two omnibuses, and went to get his dinner. He was unwell and delayed his return for a short time, and the conductor, who had been left in charge of the omnibus, got on the box and drove through some by-streets, apparently in order to bring the omnibus to the place from which the next journey was to begin, and turned in the right direction. According to the plaintiff's witnesses the conductor drove at the rate of eight miles an hour, and at the corner of a street the omnibus ran into the plaintiff and injured him. No evidence was given on

behalf of the plaintiff of any authority to the conductor to drive the omnibus. At the end of the plaintiff's evidence it was submitted that the plaintiff had not made out his case; and the learned judge took that view, and entered judgment for the defendants.

The plaintiff appealed.

Moyses and *Wallach*, for the plaintiff. The question whether the conductor when driving was acting within the scope of his authority ought to have been left to the jury. It was sufficient for the plaintiff to shew that the person of whose negligence complaint is made was a servant of the defendants, sent out by them in partial charge of the omnibus, and a primâ facie case of authority was made out which the defendants ought to have been called on to meet.

[They cited *Gwilliam* v. *Twist* (1); *Limpus* v. *London General Omnibus Co.* (2); *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway* (3); *Whatman* v. *Pearson*. (4)]

Jelf, *Q.C.*, and *Clavell Salter*, for the defendants. The onus lay on the plaintiff to shew that the act of the conductor in driving the omnibus was within the scope of his authority—merely shewing that he was the conductor of that particular omnibus was not sufficient, for the duties of driver and conductor are distinct. The plaintiff failed to make out his case, and the judgment was rightly entered for the defendants.

[They referred to the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 10, *Smith* v. *Keal* (5), and *Ex parte Mitcham*. (6)]

Moyses, in reply.

A. L. SMITH L.J. This is an appeal from an order of my brother Lawrance directing judgment for the defendants, and I propose to deal with it on the facts of the case, as in my opinion the cases cited have no bearing on the matter before us.

It appears that the plaintiff, while riding a bicycle, was run over by an omnibus belonging to the defendants. He brings

(1) [1895] 2 Q. B. 84.
(2) (1862) 1 H. & C. 526; 32 L. J. (Ex.) 34.
(3) (1873) L. R. 8 C. P. 148.
(4) (1868) L. R. 3 C. P. 422.
(5) (1882) 9 Q. B. D. 340.
(6) (1864) 5 B. & S. 585.

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A. L. Smith L.J.

an action against the company for the negligence of the person who was driving the omnibus. I agree that on a plaintiff giving evidence that the driver of an omnibus of the defendants was guilty of negligence, there would be a primâ facie case that the omnibus was being driven by an authorized servant of the company within the scope of his employment. But that is not this case, for it was expressly opened to the jury as a case in which the omnibus was not being driven by the driver who was employed to drive it, but by the conductor. When a case is so opened, that negatives the presumption that the omnibus was being driven by the authorized agent of the company, because primâ facie it is not the duty of the conductor to drive any more than it is the duty of the driver to take fares. My brother Romer, in the course of the argument, put the illustration of an omnibus being driven by a stranger to the defendants. In such a case it would be impossible to say that the proof that the omnibus was being driven by a stranger would raise any case against the company. The plaintiff must in such a case have gone on to shew that the stranger was driving with the consent or approval of the company, or on such an emergency that their consent must be implied. There was no evidence on either of these points as regards the conductor; and therefore Lawrance J. came to the conclusion —and, in my opinion, rightly—that the plaintiff had not made out a primâ facie case. I think, therefore, that the appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I think this case is somewhat on the border line. I agree that, if on the plaintiff's evidence it was clear that the conductor was doing something outside his functions, the judgment was rightly entered for the defendants; but I do not think one has any right to assume, without any evidence being given as to what are the functions of a driver and a conductor, that it is necessarily beyond the functions of a conductor to take charge of an omnibus in the absence of the driver. It seems to me that the company send out their omnibus in charge of a driver and a conductor, and that, though they have different functions to perform, it is not inconsistent with that fact that it may be within the scope of

the authority of one of them temporarily to perform the duties of the other in his absence. If the evidence of the plaintiff had shewn that one journey had come to an end and another commenced, and that between these points of time the conductor had turned the omnibus round, I should have thought that there was a case for the jury, and that it would be for the defendants to shew that the act was outside the scope of the authority of the conductor to take charge during the absence of the driver. I have, however, looked through the evidence, and I find that the omnibus was not merely being turned round, but was in a side street, and was coming downhill at the rate of eight miles an hour; and it does seem on the evidence as if the conductor was not merely performing some temporary duty during the absence of the driver, and that the driver may possibly have done that which he had no right to do—that is, delegate his authority to the conductor. I think very strongly that it would be unfortunate that it should go forth to the public that, whenever a conductor is found exercising some function of the driver, no case can be made against the omnibus proprietor unless the plaintiff is in a position to call evidence to account for the temporary absence of the driver. It seems to me to be a sounder view that, where a driver and a conductor are sent out in charge of an omnibus and complaint is made of some act done by the conductor, it should be left to the jury to say whether that act so complained of was within the authority given to the conductor. It is all very well to say that one knows that the authority given to a driver is to drive, and that given to the conductor is to conduct, but it is incorrect to say that one is entitled to deal with the case on that hypothesis. I cannot myself say whether at the end of one journey and the beginning of the next the conductor has any duty with reference to the horses, or what that duty, if any, may be.

As far as this case is concerned, it appears by the plaintiff's own evidence that the omnibus was being driven downhill at a great pace, and it may be that on the evidence of what was actually done the onus of proof lay on the plaintiff to shew that such an act was within the authority of the conductor,

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Vaughan Williams L.J.

and it may be that the mere absence of the driver was in itself no ground for letting the case go to the jury. I have considered it right to express my view that, in the absence of the driver when the omnibus is out taking passengers, primâ facie it is the duty of the conductor to take charge of the omnibus in the absence of the driver, and, if what he does is apparently consistent with that duty, it would be for the defendants to prove that in fact what he was doing was beyond his functions.

I wish to point out that in *Gwilliam* v. *Twist* (1) there was no question as to anything done by the conductor, and that the driver was not absent.

Generally, in my opinion, such a question as is raised in this case should go to the jury; but on the facts of this particular case I agree that the judgment for the defendants was right, and that the appeal should be dismissed.

ROMER L.J. I agree that the plaintiff's appeal fails. If one sees in the streets of London an omnibus admittedly belonging to the defendant company driven in the ordinary way by a person who appears to be a driver, the presumption is that he is authorized by the company. That presumption may be removed. In this case it was rebutted by the plaintiff's evidence, for it was proved that the de facto driver was not the person authorized to drive, but a person authorized and employed to act as conductor. In such a case the onus of shewing some special authority given to the conductor to do the act which he did lies upon the plaintiff. No such authority was shewn, and no case of necessity to do the acts which the conductor did was suggested, nor do the facts lead to any presumption that a case of necessity had arisen. The plaintiff has not met the onus of proof which was on him by giving the requisite evidence; and I therefore think that the judgment appealed against was right.

Appeal dismissed.

Solicitors for plaintiff: *Osborn & Osborn.*
Solicitors for defendants: *Hicks, Davis & Hunt.*

(1) [1895] 2 Q. B. 84.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1900
July 6.

MATTHEWS AND OTHERS *v.* USHER AND OTHERS.

Landlord and Tenant—Mortgagor in Possession—Ejectment for Breach of Covenant—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 5.

The Judicature Act, 1873, s. 25, sub-s. 5, does not give to a mortgagor in possession of land, subject to a lease, the right to re-enter for breach of the covenants of the lease.

APPEAL from a judgment of Ridley J. at the trial of the action without a jury.

On March 10, 1819, a lease was granted by one Severn of certain houses to one Everard for the term of eighty-one years. The lease contained a covenant by the lessee, for himself, his executors, administrators and assigns, to repair and keep in repair the houses during the term, and a proviso that the lessor, his heirs and assigns, might re-enter on breach of any of the covenants of the lease. The dealings with the property were complicated, but in the year 1898 the plaintiffs in this action were mortgagors in possession subject to the lease, and were in receipt of the rents and profits. In July of that year they served notice upon the tenants under s. 14 of the Conveyancing Act, 1881, giving as the ground of forfeiture a breach of the covenant to repair, and they afterwards brought this action to recover possession of the houses from the tenants.

At the trial the mortgagee was added as plaintiff. The learned judge held that under s. 25, sub-s. 5, of the Judicature Act, 1873 (1), the plaintiffs were entitled to succeed, and he gave judgment accordingly.

The defendants appealed.

(1) 36 & 37 Vict. c. 66, s. 25, sub-s. 5: "A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

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R. M. Bray, Q.C., and *Brooke Little*, for the defendants. The original plaintiffs, not being legal owners of the reversion, but only owners of an equity of redemption, are not entitled to exercise the powers of re-entry contained in the lease. They are not put in a better position by the addition of the mortgagee as plaintiff because the notice under the Conveyancing Act was not given by him. Before the Judicature Act, 1873, a mortgagor in possession could not recover in ejectment. There must have been an election to forfeit, and the only person entitled to make this election was the owner of the legal estate. If the lease were at an end, s. 25, sub-s. 5, might apply, but where a lease is subsisting, as this was, the section gives no power to a mortgagor to exercise the rights of a mortgagee. The Conveyancing Act does that to some extent in leases subsequent to that Act. It might well happen that the mortgagee might have an interest in the continuance of the lease and against forfeiture. No person but the lessor and his heirs and assigns is entitled to exercise the right of re-entry unless the right is given by statute. The assigns, however, must be legal assigns.

[They cited *Municipal Permanent Investment Building Society* v. *Smith*. (1)]

Dickens, Q.C., and *H. Tindal Atkinson* (with them *W. M. Spence*), for the plaintiffs. It is admitted that unless the right of re-entry is given by statute it does not exist; but the Judicature Act, 1873, was directed to putting the mortgagor in the position of the mortgagee—that is, it adopted the view of equity that he was owner and the mortgagee incumbrancer. That in itself would not be enough without a remedy by action, and that is given by s. 25, sub-s. 5. The words "sue for possession" are general, and should not be cut down in an enabling statute. There is an implied authority by the mortgagee to the mortgagor to take steps to protect the property in cases in which the former does not intervene: *Trent* v. *Hunt*. (2) At all events, the defect, if any, is cured by the joinder of the mortgagee as plaintiff.

(1) (1888) 22 Q. B. D. 70.
(2) (1853) 9 Ex. 14; 22 L. J. (Ex.) 318.

[They cited *Heath* v. *Pugh* (1); *Fairclough* v. *Marshall*. (2)]
Bray, *Q.C.*, in reply.

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A. L. SMITH L.J. The point in this case is short. It is whether or not when the equity of redemption of leasehold premises is in a mortgagor he can take proceedings for forfeiture under a lease. The lease declares that the lessor, his heirs and assigns, may re-enter on breach of certain covenants, and the first point that arises is that the mortgagor is not an assign of the lessor. Assign in such case means legal assign, and a person who owns an equity of redemption does not come within that description. It is said, however, that s. 25 of the Judicature Act, 1873, gives him a right to bring ejectment for a forfeiture. I am of opinion that s. 25 does not cover the present case. It is conceded that before the passing of that Act the mortgagor had no such right as is now claimed for him. Sub-sect. 5 of s. 25 enacts that a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which the mortgagee has given no notice of his intention to take possession, or to enter into the receipt of the rents and profits, may sue for possession, or for the recovery of such rents and profits. The original plaintiff in this case, the mortgagor, was not entitled to possession of any land. The lease had not been forfeited when the action was brought, and he was therefore not entitled to possession of the land. It is said that the effect of the statute is that he stands in the shoes of the mortgagee; but, at the time when the action was brought, the mortgagee had not given notice, and therefore he could not have entered into possession. My view of the section is that it enacts that a mortgagor entitled to possession may sue for possession, and that a mortgagor entitled to receipt of the rents and profits may sue for them. The words of the section so far should be read reddendo singula singulis. There are other matters dealt with in the section, as to which it is not necessary to-day to decide as to whether they refer to both branches of the earlier part of the section. I do not find that there are any authorities as to

(1) (1881) 6 Q. B. D. 345. (2) (1878) 4 Ex. D. 37.

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this sub-section. The learned judge referred to cases which are clearly not authorities, but he thought that the general trend of these decisions was in favour of the plaintiff. At the trial the mortgagee was joined as a plaintiff, and it is suggested that, the right person being now on the record as plaintiff, the action ought to succeed; but to this it is sufficient answer that the added plaintiff did not give the requisite notices.

VAUGHAN WILLIAMS L.J. I entirely agree. I desire to say a few words about the words at the beginning of s. 25, sub-s. 5. They obviously deal with rights in the mortgagor which, as the law then stood, could not be enforced by him in an action of law in his own name. The section says that those rights may in future be enforced by him in his own name. It cannot, in my opinion, have been intended that if the mortgagor has no such rights he is to exercise them. It is a condition precedent that the mortgagor shall have that which, though not a legal right, is still a right. In this case he has no right. It is said that he is entitled not only to enforce the rights which he has, but also to stand in the shoes of the mortgagee and enforce any rights that the latter may have. Even if that were assumed to be correct, the mortgagee in the present case has not the right which is claimed, for his right is dependent on his election to treat the breach of covenant as a forfeiture, and at the time of action brought there had been no election by him to do this, and he had not taken any of the steps required by the Conveyancing Act. It is abundantly clear in this case that the mortgagor when he brought the action had no right either in himself or as standing in the shoes of the mortgagee to claim a forfeiture, for there had been no election to forfeit by the only person entitled to elect.

ROMER L.J. I agree. I will state briefly the position of a mortgagor in possession of land held by a tenant on a lease created before the mortgage. He had certain equitable rights and certain restricted legal rights. As an example of the former, he has a right to restrain by injunction the tenant from doing injury to the land. As an example of a legal right, he is

entitled to receive the rents payable by the tenant, and to distrain at law as bailiff of the mortgagee. But before the Judicature Act, 1873, the mortgagor was not entitled to say that he had the legal reversion which would entitle him to sue on the covenants of the lease. It is clear, having regard to the state of the authorities, that the mortgagor had no implied authority to act on behalf of the mortgagee and re-enter for breach of covenant. As I have already stated, the legal rights of the mortgagor were very limited, and the reasons given for the decisions in cases in which it is said that he may act as agent for the mortgagee shew that the Courts would not have recognised any authority in the mortgagor to determine the lease as agent for the mortgagee. In this respect he could only act by reason of special legislation. The only legislation referred to as justifying that which the plaintiffs have done in the present case is the Judicature Act, 1873. Sect. 24, sub-s. 4, does not assist them, for that sub-section only requires that the equitable right of the mortgagor should be recognised in courts of law, but gives him no legal rights. Sect. 25, sub-s. 5, does give him legal rights which he had not before, and if the plaintiffs can justify their action they must do so under that sub-section. It is not easy to construe, and questions of difficulty have been raised, but I think it is only necessary to say that that sub-section does not give to a mortgagor any power of re-entry or right of forfeiture which he had not before. The mortgagee alone could elect to re-enter for a forfeiture. In the present case he has not elected to do so. The lease was a subsisting one, and there had been no forfeiture. The mortgagor, therefore, cannot say that he was a person entitled to possession of the land, or able to sue for possession. This sub-section, whatever rights it may give to a mortgagor in possession, does not give him the right to eject the tenant while the lease is subsisting.

Appeal allowed.

Solicitors for plaintiffs: *Peacock & Goddard.*
Solicitors for defendants: *G. F. Hudson, Matthews & Co.*

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July 3, 18.

[IN THE COURT OF APPEAL.]

MILBURN & CO. *v.* JAMAICA FRUIT IMPORTING AND TRADING COMPANY OF LONDON.

Ship—General Average—Charterparty—Bill of Lading—Negligence Clause.

Where a contract for carriage of goods by sea contains an exception of negligence of the master and crew, the shipowner is entitled to a contribution from the owner of the goods to general average expenses, though the necessity for the same has been occasioned by the negligence of the master:—

So *held* by A. L. Smith L.J. and Romer L.J., Vaughan Williams L.J. dissenting.

A charterparty, which contained an exception of the negligence of the master and crew, provided that the captain should sign bills of lading at any rate of freight the charterers or their agents might choose without prejudice to the stipulations of the charterparty, and that the charterers should indemnify the shipowners from any consequences which might arise from the captain following the charterers' instructions and signing bills of lading.

The captain, upon the instructions of the charterers, signed bills of lading for goods shipped by a third person, which did not contain a negligence clause. The ship coming into collision with another ship through the negligence of the captain, general average expenses were incurred in putting back for repairs:—

Held, that the charterers were liable to indemnify the shipowners against the loss sustained by them through their not being able to obtain a general average contribution from the owner of the goods by reason of the bills of lading not containing a negligence clause.

The Carron Park, (1890) 15 P. D. 203, approved of.

APPEAL from the judgment of Mathew J. at the trial of an action before him without a jury.

The action was brought to recover an indemnity from the defendants upon a clause in a charterparty, by which the defendants, the charterers, undertook to indemnify the plaintiffs, the shipowners, against the consequences of the captain signing bills of lading in accordance with the instructions of the charterers.

By the charterparty the plaintiffs' ship, *Port Victor*, was chartered to the defendants for the term of thirty-six months at a certain rate per month. The charterparty did not amount

to a demise of the ship, and the captain and crew remained the servants of the owners and in possession of the ship on their behalf. Clause 10 of the charterparty was as follows: "The captain shall sign bills of lading at any rate of freight the charterers or their agents may choose, without prejudice to the stipulations of this charterparty, and the charterers hereby agree to indemnify the owners from any consequences that may arise from the captain following the charterers' instructions and signing bills of lading. The captain to attend daily when in port at charterers' or their agents' office. The owners shall not under any circumstances be liable for condition of fruit or other cargo, and the charterers hereby indemnify the owners against any claim arising under any bill of lading." By clause 13, in the event of loss of time from deficiency of men or stores, breakdown of machinery, grounding, stranding, or damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire was to cease until the vessel should be again in an efficient state to resume her service. Clause 22 contained an exception clause by which (among other things) negligence, default, or error in judgment of the pilot, master, officers, engineers, refrigerating engineers, mariners, or other servants of the shipowners or charterers was to be always mutually excepted, and it provided that in the event of breakdown of the steamer, or accident, all port charges, pilotages, and other expenses thereby occasioned were to be for owners' account. By clause 25, average, if any, was to be regulated according to York-Antwerp Rules, 1890.

During the currency of the charterparty, the *Port Victor* shipped in London for carriage to Jamaica (amongst other cargo) certain Government stores under bills of lading, signed in pursuance of the defendants' instructions, which did not contain any exception of the negligence of the master and crew such as that contained in the charterparty. During the voyage from London to Jamaica the ship, by reason of negligence of the master and crew, came into collision with another vessel, and was in consequence compelled to put back to the port of London for repairs, and general average expenses were incurred in putting back, in payment of tug, pilot, and port dues, wages

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and victualling of crew, and other matters. The plaintiffs alleged that, in consequence of the bills of lading with regard to the Government stores not containing any negligence clause, they could not obtain from the Government any general average contribution in respect of the expenses of putting back to London, and they therefore claimed to be indemnified in respect of the loss of such a contribution under clause 10 of the charterparty. Mathew J. held, on the authority of the decision in the case of *The Carron Park* (1), that the plaintiffs had been prevented from obtaining a general average contribution from the Government by reason of the bills of lading not containing a negligence clause, and he further held that the provision in clause 22 of the charterparty, by which, in the event of breakdown of the steamer or accident, all port charges, pilotages, and other expenses thereby occasioned were to be for owners' account, did not apply to general average expenses, but had reference to cases of breakdown, &c., within clause 13. The learned judge therefore gave judgment for the plaintiffs for an amount agreed upon by the parties.

June 29; July 3. *Carver, Q.C.*, and *Scrutton*, for the defendants. Clause 10 of the charterparty only contemplates an indemnity against liabilities incurred by the shipowners in consequence of signing bills of lading as required by the charterers, and does not apply to such a consequence as the inability to claim a general average contribution from the owners of the goods shipped under the bills of lading.

Secondly, if the bills of lading had contained a negligence clause, the shipowners could not have obtained a general average contribution from the owners of the goods. The negligence clause has no relation to general average, which depends on the law maritime and not on contract. By that law the shipowner cannot claim a general average contribution in respect of a sacrifice or expense which was rendered necessary by the negligence of his own servants, the master and crew. The object of the negligence clause is to exempt the shipowner from an obligation to which under the contract of

(1) 15 P. D. 203.

carriage he would otherwise have been subject; but the plaintiffs are seeking in this case to make use of it as giving the shipowner a right which by the law in relation to general average he would not have. It is submitted that to treat it so is to give it an operation never contemplated by the parties and altogether foreign to the scope of it. The case of *The Carron Park* (1), upon the authority of which Mathew J. decided this case, was wrongly decided as regards this point, and should be overruled.

[They also cited on this point: *Schloss* v. *Heriot* (2); *Schmidt* v. *Royal Mail Steamship Co.* (3); *Crooks* v. *Allan* (4); *Burton* v. *English* (5); *The Mary Thomas* (6); *The Ettrick.* (7)]

It is submitted that most, if not all, of the expenses which were incurred by the plaintiffs fall within the proviso at the end of clause 22, and are therefore by the express terms of the charter made owners' expenses.

Joseph Walton, Q.C., and *Balloch*, for the plaintiffs. The plaintiffs are entitled to an indemnity from the defendants under clause 10 of the charterparty, because, in consequence of the plaintiffs' captain having signed bills of lading which did not contain a negligence clause by the directions of the defendants, they could not obtain a general average contribution from the owners of the goods, which they could have done, if the bills of lading had, like the charterparty, contained such a clause.

First, the terms of clause 10 according to their natural interpretation clearly cover the case. Secondly, if the bills of lading had contained a negligence clause, the plaintiffs could have obtained a general average contribution from the owners of the goods. The case of *The Carron Park* (1) was rightly decided. The reason why by the law maritime the shipowner cannot obtain general average contribution in respect of a sacrifice or expense necessitated by his servant's negligence is that, in the absence of a negligence clause, he is in default,

(1) 15 P. D. 203.
(2) (1863) 14 C. B. (N.S.) 59.
(3) (1876) 45 L. J. (Q.B.) 646.
(4) (1879) 5 Q. B. D. 38.
(5) (1883) 12 Q. B. D. 218.
(6) [1894] P. 108.
(7) (1881) 6 P. D. 127.

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and has committed through his servant a breach of duty; and he cannot claim contribution towards the sacrifice or expense incurred by him in endeavouring to obviate the danger occasioned by his default: *Strang, Steel & Co.* v. *Scott & Co.* (1) But, where negligence of the master and crew is mutually excepted, the shipowner is not in default by reason thereof, and therefore there is no reason in such a case why the right to general average contribution should not exist in his favour. At the time of the sacrifice, the interest of the owner of the goods is in such a case at risk as well as that of the owner of the ship, because the shipowner will not be liable to the owner of the goods in respect of the loss of or damage to them caused through the negligence of the captain or crew. The situation is therefore exactly that in which, according to the general principles upon which the law of general average is based, there ought to be contribution by the owner of the goods, namely, one in which, both interests being at risk, a sacrifice is made for the sake of both. The proviso to clause 22 has no application to the question of general average. Clause 25 of the charterparty is the clause which relates to general average.

Carver, Q.C., in reply. The negligence clause no doubt exempts the shipowner from liability for breach of contract, but he still has a duty towards the cargo owner arising out of their relation as co-adventurers, and may be guilty of default for the purposes of the doctrine of general average. [He cited *Pirie & Co.* v. *Middle Dock Co.* (2)]

Cur. adv. vult.

July 18. A. L. SMITH L.J. read the following judgment:— This is an action by the owners of the steamship *Port Victor* against the charterers thereof upon an indemnity clause contained in the charterparty, whereby the defendants agreed with the plaintiffs to indemnify them "from any consequences that may arise from the captain following the charterers' instructions and signing bills of lading." I agree with my brother Mathew that the scheme of the charterparty is that, while the ship was to be employed as a general ship, the owners were to be in the

(1) (1889) 14 App. Cas. 601. (2) (1881) 44 L. T. 426.

same position as if the goods put on board were the charterers' goods. By this charterparty it was provided that negligence or default of the master, officers, mariners, and other servants of the shipowners or charterers was to be always mutually excepted. The captain, following the directions of the charterers, signed bills of lading for certain Government stores shipped on board the *Port Victor* by the Government. In these bills of lading there was no exception as to negligence or default of master, officers, mariners, and other servants of the shipowners. During the voyage covered by the charterparty and bills of lading, by reason of the negligence of the master, the plaintiffs' ship came into collision with another vessel, and in consequence thereof it is not disputed that general average expenses were incurred in putting back to London, in payment of tug, pilot, and port dues, of wages and victualling the crew, and of other matters. The plaintiffs thereupon demanded contribution for these general average expenses from the shippers of the Government stores, which demand was refused upon the ground that these expenses had arisen owing to the negligence of the plaintiffs' master; and it is not denied that, if the general average expenses arose owing to such negligence, as the bills of lading contained no exception as to this negligence, the cargo owners, that is, the shippers of the Government stores, would not be liable to make general average contribution to the plaintiffs. Lord Watson, in *Strang, Steel & Co.* v. *Scott & Co.* (1), sums up the position as follows. He says: "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property

(1) 14 App. Cas. 601.

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which was imperilled by his own tortious act." The allegation of the plaintiffs, the shipowners, is that, if there had been inserted in the bills of lading an exception as to negligence of the master, which usually is the case, there would then as between themselves and the cargo owners have been no negligence or default of the master, for this would then have been excepted. Mr. Carver, for the defendants, on the other hand, asserts that the introduction of such an exception into the bills of lading would have made no difference whatever, for he says that general average is not the creature of contract. In this I agree, for the foundation of a general average claim is ordinarily not that of contract, but it is founded upon a loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo in the time of peril, and which must be borne proportionately by all who are interested. See per Lawrence J. in *Birkley* v. *Presgrave*. (1) Lord Esher, in *Burton* v. *English* (2), says that the right to contribution comes "from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved." But, although general average is not the creature of contract, that does not settle the question in the present case; for what the contract of carriage is becomes an important factor when considering, not whether a general average claim for contribution has arisen, but in considering, assuming that such claim has arisen, whether it can be taken away by the cargo owner shewing that, as between him and the shipowner, the latter, to use Lord Watson's words, has been a wrongdoer. To create the shipowner a wrongdoer as regards the cargo owner there must be the breach of some duty, and, if by agreement between the two it has been agreed that it shall be no breach of duty for the master to be guilty of negligence, in other words, that as between the two the negligence of the master shall be

(1) (1801) 1 East, 220, at p. 228; 6 R. R. 256.
(2) 12 Q. B. D. 218, at p. 221.

always excepted, it cannot be said that it is a breach of duty towards the cargo owner for the master to be guilty of that which the cargo owner and shipowner have agreed shall be no breach of duty at all. This appeal raises the question whether *The Carron Park* (1), decided by Sir James Hannen in the year 1890, is good law. That very learned judge says: "The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it." Having cited Lord Watson's judgment in *Strang, Steel & Co.* v. *Scott & Co.* (2), Sir James Hannen proceeds: "Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract that the shipowner shall not be responsible for the negligence of his servants in the events which have happened." This decision of Sir James Hannen has been acted upon in practice in this country ever since it was given, and we are asked now to overrule it. It was expressly approved of by Gorell Barnes J. in *The Mary Thomas* (3), and my brother Mathew does not doubt its accuracy in his judgment now appealed from; and, in my opinion, it correctly followed out the decision in the Privy Council delivered by Lord Watson in *Strang, Steel & Co.* v. *Scott & Co.* (2) I believe *The Carron Park* (1) is in accord with the law of England relating to general average in this country. It is said that *The Carron Park* (1) is not in accord with what has been said in *Schmidt* v. *Royal Mail Steamship Co.* (4) and *Crooks* v. *Allan* (5), cited by Bowen L.J. in *Burton* v. *English* (6)—namely, "the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average." When read it will be seen that these cases do not deal with the question whether, where a general average expenditure has been incurred, the right to contribute thereto can be taken away by shewing that the party incurring the

(1) 15 P. D. 203.
(2) 14 App. Cas. 601.
(3) [1894] P. 108, at p. 117.
(4) 45 L. J. (Q.B.) 646.
(5) 5 Q. B. D. 38.
(6) 12 Q. B. D. at p. 222.

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expenditure was a wrongdoer as regards the person called upon to contribute. Whether he be such a wrongdoer must, as it seems to me, depend upon the contract which existed between the parties. This is not, as before stated, a case in which the question is whether a general average claim has arisen, for that in this case is not disputed, but the question is whether the shipowner has been a wrongdoer to the cargo owner. The shipowner says to the cargo owner, a general average loss has occurred to which you must contribute, and you cannot shew that I have been guilty of negligence so as to absolve you from contributing thereto, for by express contract between us negligence is excepted. That the contract may at times be looked to appears from what Willes J. said in *Johnson* v. *Chapman* (1), where the question arose whether the owner of a deck cargo was entitled to claim general average in respect of such cargo jettisoned, and it was held that he was; for, said Willes J., "when you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average." Lord Watson, as will be seen, deals with the effect an exception as to negligence in a bill of lading may have upon a general average claim in *Strang, Steel & Co.* v. *Scott & Co.* (2) In the present case it is clear that the plaintiffs have been unable to obtain a general average contribution from the shippers of the Government stores by reason of no clause excepting negligence having been inserted in the bills of lading, and in my judgment the charterers are therefore liable to the plaintiffs under the indemnity clause in the charter now sued on, by reason of bills of lading having been signed without the exception of negligence being contained therein. As to the second point—namely, as to the effect of the clause at the end of paragraph 22 of the charterparty—I have nothing to add to what my brother Mathew has said thereon, except to say that I agree with him. In my judgment, for the reasons above, the appeal must be dismissed.

VAUGHAN WILLIAMS L.J. read the following judgment:—In this case the charterers have agreed to give the shipowners

(1) (1865) 19 C. B. (N.S.) 563, at p. 583. (2) 14 App. Cas. 601.

an indemnity against any consequences that may arise from the captain's following the charterers' instructions and signing bills of lading; and the question is whether it is a consequence of the captain's signing the bills of lading, which in fact he did sign, that the shipowners have lost a right of general average contribution which they would otherwise have had against the owners of part of the cargo shipped. The peril in respect of which the expenses were incurred by the ship, which form the basis of the claim for general average contribution, was a peril incurred by the negligence of the officers and crew of the ship, who under the charterparty continued to be the servants of the shipowners, and in possession of the ship on their behalf. The charterers had nothing to do with the navigation of the ship. The cause of the peril was careless navigation resulting in a collision with another ship.

Now, it is clear law that the rule of contribution has no application in cases where the danger which led to the sacrifice was brought about by the fault of the person claiming contribution, and, if the right of contribution was thus excluded, it could not be said that the fact that the ship could make no claim for contribution was the consequence of the captain's following the instructions of the charterers and signing the bills of lading, and the case would not fall within the scope of the contract of indemnity. In such circumstances, in the absence of some special contract, the right to contribution would never arise, and it would not be true to say that the exclusion of the right to contribution was due to anything but the negligence of the shipowners' servants. But it is said that, if the bill of lading had been in a different form from that in which it in fact was, and had contained, as undoubtedly is very usual, an exception of negligence of the master and crew, the right to contribution would have arisen. The case of *The Carron Park* (1) is relied on as an authority that such an exception in the contract of carriage would have this effect, and seems so to decide. Lord Hannen, speaking of such an exception in a contract of carriage, in that case a charterparty, says: "Here it appears to me that the relation of the goods owner to the

(1) 15 P. D. 203.

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shipowner has been altered by the contract" (constituted by the exception) "that the shipowner shall not be responsible for the negligence of his servants"; and Lord Hannen held on this ground that the shipowner was entitled to recover general average contribution, although the peril was caused by the negligence of the ship's officers. The conclusion of Lord Hannen was based upon a passage in the judgment of Lord Watson in *Strang, Steel & Co.* v. *Scott & Co.* (1), in which he said: "The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers." I do not think that the judgment of Lord Watson justifies the decision in *The Carron Park* (2), and the decision in *The Carron Park* (2) does not bind this Court, and it is our duty to consider whether that decision was right in principle. I think it was not. I think that the exceptions in the contract of carriage had nothing to do with the liability of the shipowner under the law of general average contribution. The liability to contribute in no sense results from the contract of carriage, but exists wholly independently of the contract of carriage, by virtue of the equitable doctrine of the Rhodian law, which as part of the law maritime has been incorporated in the municipal law of England. Lush L.J. in *Schmidt* v. *Royal Mail Steamship Co.* (3) says: "The office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average." This dictum of Lush L.J. is affirmed emphatically by all the members of the Court of Appeal in *Burton* v. *English*. (4) It has been argued that there is no duty on the shipowner except that contained in the contract of carriage: in cases in which there is a contract of carriage it is said that this contract of carriage excludes the common law liability of carriers excepting so far as it is expressly or impliedly incorporated in the contract of carriage.

(1) 14 App. Cas. 601, at p. 609.
(2) 15 P. D. 203.
(3) 45 L. J. (Q.B.) 646.
(4) 12 Q. B. D. 218.

I agree that, so far as regards the obligation to carry and deliver, the contract of carriage is exhaustive, and that the exception applies to every duty under that contract. But the rule of the Rhodian law excluding the person through whose fault the peril arose from benefits of general average contribution is based upon an obligation outside the contract of carriage. It is based upon that duty, which arises, whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, to use ordinary care and skill to avoid such danger: *Heaven* v. *Pender*. (1)

(The charterparty leaves the ship in the possession of the shipowner, and its navigation in his control.) This entails on the shipowner a duty to take due care in the navigation of his ship, because otherwise danger will arise for the persons and property of others, both the persons and property on board his own ship and the ships he may meet and the persons and property therein; and, if he fails in the observance of this duty, and peril is thereby caused to the persons or goods on board his own ship, he is in my judgment at fault in such sense as to exclude him from the benefits of the maritime law of contribution. He has failed in his duty to his co-adventurers; he cannot claim contribution because the peril has been caused by his fault, and the fact remains that it was caused by his fault, notwithstanding the fact that it may be a term of the charterparty that the charterer shall relieve him from responsibility so far as relates to the contract of carriage for the fault of which he has been guilty. In my judgment the only way in which a shipowner can be placed in a position to recover general average contribution in a case where the peril has arisen from the negligence of the master and crew is a case where the master and crew have ceased, by the terms of the charterparty or otherwise, to be the servants or agents of the shipowner. In my opinion the exception in the charterparty has not this effect, and a similar exception in the bill of lading would not have

(1) (1883) 11 Q. B. D. 503.

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had that effect. The exception in the bill of lading relieves the shipowner from all breaches of the contract of carriage brought about by the negligence of the master or crew, but it does not relieve the shipowner from those legal duties which are by law cast upon him by reason of the fact that the ship is in possession of his servants and navigated by him. If the peril is caused by the negligence of his servants in navigating the ship, he is a person at fault within the meaning of the law of general average contribution, and, so long as the ship is navigated by his servants, the shipowner can no more get rid of responsibility for his legal duty by a contract which he makes with a third person than a man can get rid of a statutory or any other positive duty arising from his position by any contract which he makes with any person upon whom the duty is not by law cast. I think *The Carron Park* (1) was wrongly decided. I think, therefore, that the plaintiffs cannot recover, and that the judgment of Mathew J. ought to be reversed. The case of *Johnson* v. *Chapman* (2) only comes to this. It was sought to say that deck cargo could not have the benefit of general average contribution. Willes J. said that there was no law making it unlawful to carry deck cargo, but that it was suggested that there was a custom affecting the voyage, and that it was not necessary to consider this, as by the contract between the parties there was to be a deck cargo. It was not suggested that the carrying of the deck cargo made the ship unseaworthy, and Willes J. under those circumstances said that, when you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to the rule of general average: see p. 583 of the report. The case in no sense decides that the obligation of the co-adventurers on a voyage towards their fellows to take care not to bring them or their property into danger, is the creature of contract, or that by contract between two of the co-adventurers the law of general average contribution can be so modified that it shall operate in favour of the guilty. Two co-adventurers may agree that they will make no claim on one another for general average contribution, and thus as between themselves exclude the Rhodian law; or two may agree that as between them

(1) 15 P. D. 203. (2) 19 C. B. (N.S.) 563.

there shall be general average contribution, notwithstanding the fact that the claimant by his negligence brought about the peril necessitating the sacrifice or general average act; but in such a case the right to contribution would in no sense depend on the law maritime incorporated in the municipal law of England, but would be entirely the creature and result of contract. In my judgment the law of general average contribution cannot be applied in favour of a claimant through whose fault, whether personal or by his agents, the maritime peril was in fact brought about. Moreover, even if by special contract the right of contribution can be enforced against a party to the contract by the other party, even though his fault or negligence, his omission or his act of commission, has brought about the peril, I do not think that such a special contract is to be found in the exception to the charterparty, or would arise from the introduction of such an exception into the bill of lading. What is the business meaning of the mutual exception in the charterparty (for the exception here is mutual) of the negligence of the master and crew? It means that shipowner and charterer must each insure their own interest against losses arising during the voyage from negligence of the master and crew. The exception does not mean that the one is to have a claim against the other, but merely that each in respect of matters falling within the exception is to be relieved from the liability which otherwise would fall upon him: that is in the case of a charterparty the liability from the letting or hiring of the use of the ship; or in the case of a bill of lading the liability of the carrier of goods by sea and of the consignor of such goods; but I cannot see how the exception from these liabilities can give the party excepted a claim which he would not otherwise have had, or render the party who has the benefit of the exception liable to a claim to which but for the exception he would not have been liable. I do not think that the exception makes the charterers or cargo owners liable to the shipowners for contribution in respect of a sacrifice made to avert a danger brought about by their own negligence. The mutual exception would rather have the contrary effect if it applied at all to general average contribution.

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ROMER L.J. read the following judgment:—I have come to the conclusion that this appeal should be dismissed. I can state my reasons briefly. On this charterparty, as between the shipowners and the charterers, I think that for all purposes connected with the management of the ship during the existence of the charter, the negligence of the master and crew was not to be treated as attributable solely to the shipowners. Between shipowners and charterers such negligence was to be "mutually excepted," so that both parties could be regarded as equally blameless in respect of it. Let me then first consider how the case would have stood between the parties to the charterparty if all the goods on board the vessel during a voyage had been the property of the charterers, and then by the master's negligence a condition arose necessitating a sacrifice at the expense of the shipowners for the common good, so that primâ facie a claim for general average contribution against the owners of the cargo had arisen. In my opinion there could have been no answer to the claim. The charterers could not have brought themselves within the exception to general average claims which is so well known, and was discussed by Lord Watson in the case cited in the judgments already delivered. For the charterers could not have said as against the shipowners that the negligence of the master was to be attributed to the shipowners, so as to place the latter in the position of persons who had brought about the peril necessitating the common sacrifice by their own wrong. There would have been no ground for treating the shipowners and the charterers as standing on a different footing at the moment when the common sacrifice became necessary. As between themselves they stood at that moment on a footing of equality. Neither the goods as against the ship, nor the ship as against the goods, had any claim by reason of any peril arising, or loss which might have resulted, from the master's negligence; and the position of equality is the very essence of the right to contribution. It would in my opinion be matter for regret if the opposite view were upheld, for the result would be that, though, if loss ensued to the goods by the peril, the shipowners could not be made responsible for the loss, yet, if to avoid that peril a sacrifice is made at the expense of the ship,

there would be no right of contribution. These being in my opinion the relative rights of shipowners and charterers in a case where the goods are the property of the latter, I will now consider how matters stand in a case where the charterers ship some third person's goods, and not their own. Now in respect of these goods, it appears to me that under this charterparty the charterers, as between themselves and the shipowners, were bound, if they wished to avoid any liability towards the shipowners, to ship the goods on the same terms as their own goods—that is to say, on the terms of the charterparty. But the charterers might by the bills of lading as between themselves and the third person have shipped the goods on terms different from those of the charterparty. In that case, if any loss arose to the shipowners in consequence of the contents of the bill of lading, then by the terms of the charterparty such loss would fall on the charterers.

Now, considering the special circumstances of this case, it appears that the charterers did ship the Government's goods on terms which (as shewn by the bill of lading) materially differed from the terms of the charterparty, inasmuch as those bills of lading left the shipowners responsible for the negligence of the master, officers, and crew of the ship. The consequence has been that the shipowners have lost the right of contribution for general average, which in my opinion they would have had as against the Government's goods, if the latter had been shipped on the terms of the charterparty. That loss has, it appears to me, flowed directly from the bills of lading having been signed by the master by the direction of the charterers in a form which as between the charterers and shipowners should not have been adopted. That being so, I think the loss is a consequence of the signing of the bills of lading within the meaning of the charterparty, and is accordingly recoverable by the shipowners from the charterers. On these short grounds I think the appeal fails.

Appeal dismissed.

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *Parker, Garrett & Holman.*

E. L.

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May 8, 9, 16.

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Revenue—Estate Duty—Succession Duty—Disposition by Foreigner domiciled Abroad—Property situate Abroad—Disposition to English Company on Trusts enforceable by English Law—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 7, 8, 16.

In 1892 a foreigner domiciled in Austria gave, by deed, to an English company, registered under the Companies Acts and having its registered office in London, certain stocks, shares, and securities to a large amount upon the terms and conditions that the company would permit the donor to receive the income thereof during his life, and after his death would apply the same stocks, shares, and securities, and any investments substituted for them under the powers of the deed, for the benefit of Russian Jews generally, and principally for the promotion of the emigration of Russian Jews from Europe, and of their settlement in various countries outside Europe. The company had been formed to carry out the same objects, and shortly after the execution of the deed the property so given was handed over to the company by the donor. The whole of the company's business was, under the articles of association, transacted by a council which sat at the principal office of the company in Paris. The ordinary and extraordinary general meetings of the company were held at their registered office in London, but formal business only was transacted there. In 1896 the donor, being still domiciled in Austria, died. At that time the principal part of the securities subject to the deed were foreign securities situate abroad, and the documents of title thereto were abroad, a small proportion only of the property subject to the deed being in England:—

Held, that the company was an English company, and recourse must be had to English law in order to enforce the trusts of the deed, and, therefore, that estate and succession duty were payable, under the Finance Act, 1894, and the Succession Duty Act, 1853, upon the principal value of all the property which was subject to those trusts at the donor's death.

Information by the Attorney-General claiming estate and succession duty upon the death of Baron de Hirsch de Gereuth on property in respect of which he had made a disposition in favour of the defendants, the Jewish Colonization Association.

The following statement of the facts set forth in the information is taken from the judgment of Ridley J.:—

The Jewish Colonization Association was, on September 10, 1891, formed into a company under the Companies Acts, 1862

to 1890, by certificate of the Board of Trade. On it being proved that no portion of the income was intended to be used as profit to its members, it was registered under s. 23 of the Companies Act, 1867, without the addition of the word "Limited." Its objects were, stated generally, to assist the emigration of Jews from any parts of Europe or Asia to other parts of the world, and to form colonies for their reception. The office was to be and was in London. By art. 25 of the articles of association its affairs were to be "under the general control of a council of administration consisting of not more than six nor less than three persons" (none of whom were required to be members of the company), who were to be elected by the company in general meeting, and to hold office for five years. By the memorandum of association (clause 3) it was stated that the objects for which the company was established were (amongst others)—

(*a.*) "To assist and promote the emigration of Jews from any parts of Europe or Asia, and principally from countries in which they may for the time being be subjected to any special taxes or political or other disabilities, to any other parts of the world, and to form and establish colonies in various parts of North and South America and other countries for agricultural, commercial and other purposes":

(*c.*) "To accept gifts, donations and bequests of money and other property on the terms of the same being applied to all or some one or more of the purposes of the company, or for any other philanthropic purposes specified by the donor or testator for the benefit of Jewish communities or individuals either in Europe or America, or on such other terms as may be consistent with the objects of the company," and (inter alia)

(*n.*) "To invest and deal with the moneys of the company not immediately required for the expenditure or the operations of the company in any of the public stocks or public securities of the English, French, Belgian, Dutch, and German Governments, or of the Government of the United States of America, or of some or one of them," and

(*s.*) "To do all such other lawful things as are incidental or conducive to the attainment of the aforesaid objects, or any of

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them. Provided that the company shall observe the provisions of the 21st section of the Companies Act of 1862, where applicable, and that in case the company shall accept any gift on such special trusts as to be subject to the jurisdiction of the Charity Commissioners, the company shall, if required by the Charity Commissioners, vest the same in special trustees thereof."

The nominal capital of the company was to be 2,000,000*l.*, in 20,000 shares of 100*l.* each, of which 19,992 were allotted to Baron de Hirsch. The 7th clause of the memorandum of association provided that if, in the event of a winding-up or dissolution of the company, there remained any property, it should not be distributed among the members of the company, but transferred to some institution with objects similar to those of the company; and that if such institution should not be selected by the members at or before the time of the winding-up or dissolution, it should be selected by the judge of the High Court of Justice having jurisdiction in that behalf.

By art. 18 of the articles of association the first general meeting was to be held within four months after the incorporation, and subsequent general meetings were to be held once at least in every year in London, or such other place as the council might from time to time determine, and the council might at any time convene an extraordinary general meeting. The first general meeting was held on October 14, 1891, at the offices of the company at 17, Old Broad Street, London, and at this meeting Baron de Hirsch was elected chairman of the council, and resolutions were passed approving two sets of rules defining the duties and powers of the council. It is not necessary to set out all these rules. By the first of them the directors were to be subject to the control of the council, and to exercise all such powers of the company as were not expressly reserved to the company in general meeting.

The meetings of the company continued to be held at the registered office in London, but the business there transacted was, until after the death of Baron de Hirsch on April 21, 1896, of a formal character. The council held their meetings in Paris, and at these meetings they, by virtue of the articles of associa-

tion and of the rules, conducted its affairs. On July 22, 1892, at a meeting of the council, Baron de Hirsch proposed to hand over to the association various securities, on condition that he was allowed by them during his life to have the income resulting therefrom, and from any which might be substituted for them; and the council resolved to accept the gift, and to affix the seal of the association thereto. On August 26, 1892, in in pursuance of this resolution, an indenture was entered into and executed by Baron de Hirsch and by the association, the terms of which, so far as they need now be mentioned, are as follows :—

After reciting that the donor (Baron de Hirsch) had agreed to give and the association (the Jewish Colonization Association) had agreed to accept the stocks, shares, bonds, and securities the particulars of which were specified in the schedule thereunder written, on the terms and subject to the conditions thereinafter expressed, and that the same had been, or would shortly be, duly transferred and handed over to the association, it was witnessed that in pursuance of the said agreement the association thereby for themselves, their successors and assigns, declared and covenanted with the donor and his assigns as follows :—

1. That the association would during the life of the donor from time to time as and when directed by the donor, or his authorized agents, sell, transfer, exchange, dispose of and deal with the said stocks, shares, bonds and securities, and any other investments which might be substituted for the same, or might be otherwise subject to the provisions of the now stating indenture, and under the like directions invest the net proceeds, after deducting all costs and expenses of and incident to such sale, transfer, or exchange, in any other modes of investment which should be selected or approved by the donor, irrespective of any conditions which, according to the memorandum and articles of association of the association, were applicable to the investments held by the association for their own exclusive benefit.

2. That the association would permit the donor or his agents to receive, or would pay to him or them, the income of the

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investments for the time being held on the terms of the now stating presents, and all benefit in the nature of bonuses upon or accretions to such investments should be treated as income and not as capital, and all outgoings and expenses incident to the receipt of the said income should be paid out of the same.

3. That the association would after the death of the donor apply the stocks, shares and securities, and any other investments which may be substituted for the same or be otherwise subject to the provisions of the now stating indenture, for the benefit of the Russian Jews generally, and principally for the promotion of the emigration of Russian Jews from Europe and the settlement of such Russian Jews in various parts of North and South America and other countries outside the limits of Europe, such settlement to be made preferentially and as far as possible in agricultural colonies. At about the same time all the stocks, shares and securities mentioned in the schedule (which were at the time held partly by the London and Westminster Bank and partly by other banks situate abroad) were duly transferred by direction of Baron de Hirsch, in pursuance of the indenture, to the account of the association with the several banks, and were thenceforward held by the association upon the trusts and for the purposes declared by the indenture; and pursuant thereto from that time onwards the council paid the income accruing thereon to Baron de Hirsch during his life. All the securities were transferred by delivery.

Baron de Hirsch died, sine prole, on April 21, 1896.

The information claimed that, on the death of Baron de Hirsch, estate duty under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1 (*b*) and (*c*), and succession duty under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), ss. 7 and 8 (1),

(1) The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, imposes a duty called "estate duty" upon the principal value, ascertained as thereinafter provided, of all property, real or personal, settled or not settled, which "passes on the death" of a person dying after the commencement of the Act.

Sect. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

"(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of

became payable in respect of the value of the stocks, shares, bonds and securities specified in the schedule to the indenture

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an office, or recipient of the benefits of a charity, or as a corporation sole;

"(c) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a volunteer were omitted therefrom."

Sub-s. 2: "Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of the Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1: "The term 'succession' shall denote any property chargeable with duty under this Act."

Sect. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person . . . . either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person . . . . to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'. . . ."

Sect. 7: "Where any disposition of property, not being a bonâ fide sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor, or any other person, for any term of life or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for, on the person in whose favour such disposition shall be made."

Sect. 8: "Where any disposition of property shall be made to take effect at a period ascertainable only by reference to the date of the death of any person dying after the time appointed for the commencement of this Act, such disposition shall be deemed to confer a succession on the person in whose favour the same shall be made. . . ."

Sect. 16: "Where property shall become subject to a trust for any charitable or public purposes, under any past or future disposition, which, if made in favour of an individual, would confer on him a succession, there shall be payable in respect of such property, upon its becoming subject to such trusts, a duty at the rate of ten pounds per cent. upon the amount or principal value of such property. . . ."

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of August 26, 1892, or of the moneys and investments representing the same, and that the defendant company is accountable for such duties accordingly.

Accounts and inquiries were also prayed.

Sir Richard Webster, A.-G., and *Vaughan Hawkins* (*Sir Robert Finlay, S.-G.*, with them), for the Crown. Upon the death of Baron de Hirsch estate duty under the Finance Act, 1894, and succession duty under the Succession Duty Act, 1853, became payable in respect of the principal value of the securities specified in the schedule to the deed of August 26, 1892. The defendants were his "successors," within the meaning of the Succession Duty Act. They are an English company, and the trust created by that deed is an English trust which has to be enforced by the English tribunals. That is the test, according to the authorities, whether succession duty is payable upon the trust funds, and it is immaterial that the domicile of the settlor was foreign, or that the business of the company was transacted in Paris, or that the trusts of the deed were in favour of foreigners. The trustees under the deed are the successors of Baron de Hirsch, not the Jews who are to benefit by his disposition.

[They cited *Wallace* v. *Attorney-General* (1); *Attorney-General* v. *Campbell* (2); *In re Cigala's Settlement Trusts* (3); *Attorney-General* v. *Felce*. (4)]

Sir Robert Reid, Q.C., and *Swinfen Eady, Q.C.* (*Dicey, Q.C.*, *Danckwerts, Q.C.*, and *E. Schuster*, with them), for the defendants. There was no succession in this country. The property in question was situate abroad. It was settled by a foreigner domiciled abroad. The deed was executed abroad, and it was executed in favour of foreigners. The trusts were to be executed abroad, and the whole of the business of the association has been transacted in Paris. No case has gone so far as to say that, where all those conditions exist, there is a succession liable to duty in England. The true test is whether the domicile of the person who disposes of the personal property

(1) (1865) L. R. 1 Ch. 1.
(2) (1872) L. R. 5 H. L. 524.
(3) (1878) 7 Ch. D. 351.
(4) (1894) 10 Times L. R. 337.

is foreign. Questions arising under the deed might have to be settled by reference to the law of Austria. It is admitted that estate duty is payable upon such of the securities as were in this country, but neither estate duty nor succession duty is payable in respect of the securities which are situate out of this country.

[They cited *Thomson* v. *Advocate-General* (1); *In re Lovelace's Settlement* (2); *In re Wallop's Trusts* (3); *In re Badart's Trusts* (4); *Lyall* v. *Lyall* (5); *Cesena Sulphur Co.* v. *Nicholson* (6); *South African Breweries, Limited* v. *King.* (7)]

Sir Richard Webster, A.-G., replied.

Cur. adv. vult.

May 16. The following written judgments were delivered:—

RIDLEY J. (after stating the facts as set forth ante). It is now contended by the Crown that succession duty and estate duty are payable on the value of the securities mentioned in the schedule to the deed of August 26, 1892, or of the investments now representing the same, on the ground that the succession had descended upon them by English law, and by that law the trust must be administered. On the other hand, Sir Robert Reid, while admitting that estate duty is payable on such of the securities as were situate in England at the time of Baron de Hirsch's death (that is to say, on such of them as were at the London and Westminster Bank), contended that no succession duty was payable on any of the securities, and no estate duty on those which were situate abroad. As by s. 2, sub-s. 2, of the Finance Act, 1894, "property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes," the single question in this case is whether, under these circumstances, where the domicile

(1) (1845) 12 Cl. & F. 1.
(2) (1859) 4 De G. & J. 340.
(3) (1864) 1 De G. J. & S. 656.
(4) (1870) L. R. 10 Eq. 288.
(5) (1872) L. R. 15 Eq. 1.
(6) (1876) 1 Ex. D. 428.
(7) [1899] 2 Ch. 173.

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of the predecessor is foreign and the property is situate abroad, duty is payable under the 2nd and 16th sections of the Succession Duty Act, 1853, which enacts as follows: [The learned judge read s. 2.] It may be desirable, first, to set out what appears to be the result of previous decisions, and then to deal with the arguments. Of the cases quoted the first in order of date was *In re Lovelace's Settlement.* (1) In that case there had been an English marriage settlement made between English people, under which the property was assigned by the lady upon the usual trusts for the lives of husband and wife and the life of the survivor, and in the event (which happened) of there being no issue attaining a vested interest, then upon the trusts which the wife might by deed or will appoint, and in default of appointment for the next of kin. The parties became domiciled in France, and, the husband having died in March, 1852, the widow, in April, 1852, exercised her power of appointment by will, whereby she appointed 10,000*l.* to two persons, natives of France and there domiciled. In 1856 she died, and the appointees presented a petition for payment of the 10,000*l.* The Crown thereupon claimed succession duty, and the Vice-Chancellor decided that no duty was payable, upon the ground that the operation of s. 2 of the Act of 1853 was restrained by that of s. 4, which applies upon the death of persons dying after the time appointed for the commencement of the Act only (which date was May 19, 1853). But the Lords Justices, reversing this decision, held that the case might be within the 2nd section though not within the 4th. It was further argued that, as the domicile of the lady was French, no duty was payable any more than it would be under the Legacy Duty Act. But the Court said: "The trustees of the settlement are here. The money is in the English Funds." In effect the decision was that the Act applies to a succession under a British settlement to British property vested in British trustees and falling under the jurisdiction of a British Court, though both predecessor and successor are domiciled abroad.

In re Wallop's Trusts (2) was the next case. There an English testator gave a fund to trustees on trust to pay the

(1) 4 De G. & J. 340. (2) 1 De G. J. & S. 656.

income to his daughter for life, and after her death upon such trusts as she should by will appoint. The daughter became domiciled in Jersey, and disposed of the fund, giving two legacies to two persons and the rest to her husband. The fund was in Consols. The decision was, following *In re Lovelace's Settlement* (1), that the legacies, although not subject to legacy duty, were subject to succession duty. It does not appear that the rule laid down in the former case was in any way modified. In *Wallace* v. *Attorney-General* (2) the testator whose will was in question died domiciled in France and possessed of property both in France and in England, including a leasehold house and a large sum in Consols. It was admitted that duty was payable on the leasehold house, but the Court decided that neither succession nor legacy duty was payable on the Consols. The Lord Chancellor (Lord Cranworth) said (3): "The question, therefore, is, whether, where a person domiciled abroad makes a will giving personal property in this country by way of legacy, the legatee is a person becoming entitled to that property within the true intent and meaning of the 2nd section. I think not. I think that in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country." He pointed out the difficulty of holding otherwise. The officers of the revenue could not ascertain who were the persons entitled by foreign law, nor the duties to which they might be liable under such law; whereas, if the persons are entitled under our laws and liable to duties under our laws, their duty is simple. He further said (4): "The ground on which my opinion rests is that to the generality of the words in the 2nd section . . . . some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country." He distinguished the previous decisions of *In re Lovelace's Settlement* (1) and *In re Wallop's Trusts* (5) as having been cases of testamentary appointment under English instruments,

(1) 4 De G. & J. 340.
(2) L. R. 1 Ch. 1.
(3) L. R. 1 Ch. 7.
(4) L. R. 1 Ch. 9.
(5) 1 De G. J. & S. 656.

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and not simply of wills; such an instrument having to be construed by our own laws, not by the law of the domicile of the person executing the power.

This decision was explained and commented on in the case of *Attorney-General* v. *Campbell* (1); but previously to that had been decided the case of *In re Badart's Trusts* (2), where the testator, domiciled in Belgium, came to England and lived there for the last ten years of his life, carrying on business in this country. He left a sum of 12,000*l.* to be invested in Consols and held in trust for A. for life, and after his decease for his nephews and nieces, most of whom were foreigners. Malins V.-C. held that succession duty was payable, and he stated that in his opinion there was no succession in *Wallace's Case* (3), but that it was a mere question of legacy duty; putting in other words the argument of Mr. Karslake for the Crown—namely, that here there was not a bare legacy or gift, but a direction to invest money in England for the benefit of cestuis que trust, who would, therefore, take under English law.

The next case is that of *Attorney-General* v. *Campbell*. (1) There Callanane, an Irishman, became domiciled in Portugal. On a visit to this country he made a will directing his executors to collect his property, which was in Portugal, and convert it into cash, pay legacies out of it, and invest the residue in English 3 per cents. They were to appropriate enough to pay an annuity of 50*l.* to his sister, and on her death the appropriated fund was to revert to the residuary estate, and be divided (like all the rest) among his children. The trusts were performed, and the House of Lords held that succession duty was payable, on the death of the sister, on the part of his fortune so appropriated, because the duties of the executor involved the placing of the money here in funds within the functions of the judicature of this country. In *Wallace's Case* (3), on the other hand, all the questions relating to the distribution of the estate belonged to the judge of the domicile: that is the forum of administration. "You cannot apply," said Lord Westbury (4), "an English Act of Parliament to

(1) L. R. 5 H. L. 524.
(2) L. R. 10 Eq. 288.
(3) L. R. 1 Ch. 1.
(4) L. R. 5 H. L. 531.

foreign property whilst it remains foreign property; but after the purposes of administration have been answered and distribution made, if a party taking this distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property." That settlement, therefore, though made by a will, became, by reason of the trust for the investment of the property, subject to the rules of English law, and the duty was payable on what Lord Westbury calls "the distributive part." The fact that the investment was to be in the English funds does not seem to have been treated as the governing consideration. It is the investment on trust here that makes the property liable, not its local situation.

In *Lyall* v. *Lyall* (1) there was a marriage settlement by which a husband domiciled in New South Wales assigned to trustees certain property, including a policy of insurance on his life and a sum in Consols and 1000*l.*, which he covenanted to pay, on trust to invest and pay the income to the wife for life, then to the husband for life, and then for division among the children. The husband died in New South Wales, and was there domiciled at the time of his death; and then the wife died, leaving one child. At the time of the wife's death neither the policy money nor the 1000*l.* had been paid to the trustees. The Master of the Rolls decided with reluctance, but following the decision just quoted, that succession duty was payable on the funds to which the child became entitled. He appears to have thought that the distinction established between legacy duty and succession duty—namely, that the one is not payable when the domicile of the testator is foreign, while the latter may be so—is to be regretted. But it follows from the decision of *Attorney-General* v. *Campbell* (2) that if in order to administer property, or to carry out the trusts upon which it has been disposed, resort must be made to English law, succession duty is payable although the domicile of the testator be foreign, and it follows also from that and the previous decisions that, if the disposition of the property be made by a testator acting under a power given him

(1) L. R. 15 Eq. 1. (2) L. R. 5 H. L. 524.

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by an instrument which must be construed and carried into effect by the laws of England, then also succession duty is payable, although the domicile of both predecessor and successor is a foreign one; but if the gift or devise be made by a person domiciled abroad, then, even though the property be situate in England, unless the intervention of the English law is required in order to carry the gift or devise into effect, succession duty is not payable.

The next case was that of *In re Cigala's Settlement Trusts* (1), and on this case great reliance was placed by the Attorney-General. There there was an English marriage settlement, by which certain property, mostly situate abroad, being French Rentes, was settled by the wife on the usual trusts for husband and wife for life, and then for the children. The husband always had a foreign domicile, and the wife and children had also a foreign domicile. It was held that the property on passing into the hands of the children under those trusts was subject to succession duty. The Court said that it followed from previous decisions that a foreigner may be liable to pay succession duty; that the property was only in a certain sense foreign, and was movable, so that the right to dispose of it followed the person of the owner, and that, as the settlement was British and the property in fact English property, the duty was payable.

Finally, the law was laid down in precisely the same way in a case which in principle it is difficult to distinguish from the present one, namely, *Attorney-General* v. *Felce* (2), not reported except in the *Times Law Reports*, of which case a shorthand note was furnished to us. There a foreigner had property abroad, and, apparently wishing to place it under British protection, he appointed a trustee, and there was a declaration of the trusts on which it was held, and the securities were placed in the hands of the trustee in order that they might be deposited with bankers in this country. Upon his death succession duty was claimed from the executors, and held to be payable, for this reason—that the settlement was a British one, and designedly so, and that the trustee was

(1) 7 Ch. D. 351. (2) 10 Times L. R. 337.

subject to British jurisdiction, and that although the domicile was foreign and the property was foreign.

These later cases appear precisely to follow the rule which is properly deduced from *Attorney-General* v. *Campbell* (1), and that is, that upon devolutions of property such as are contemplated by the Succession Duty Act, s. 2, the duty is payable although there be a foreign domicile, and although the property be foreign, if in order to administer the property or the trust to which it is subject recourse must be had to an English tribunal.

Now, what is the case in the present instance? Sir Robert Reid's points were—(1.) that the property was situate abroad; (2.) that the property was settled by a foreigner domiciled abroad; (3.) that the deed was executed abroad; (4.) that the deed was executed in favour of foreigners. But the argument appears to assume that in order to make succession duty payable the domicile must be English and the property situate in England, or at all events that these are circumstances to be chiefly considered, whereas from an examination of the authorities it has been shewn that that is not so. With regard to the third point, I think this cannot be material. The deed was an English deed. It purports so to be. Baron de Hirsch and the association are alike described in it as resident in England, and the registered office of the latter is stated to be in London. I therefore think it must be treated as an English document.

With regard to the fourth point, this also, if true, would not be material according to the *Lovelace Case* (2), in which both predecessor and successor were domiciled abroad. But it seems incorrect to say that the beneficiaries of this trust—meaning by that phrase the Russian Jews—were the successors on whom this tax is to fall, if it is to fall. They are not, and no one on their behalf is, in the position of a cestui que trust, or can call on the council or the company to carry out the trust in a particular manner in favour of any one applicant or of any body of applicants. Then, is the council the successor so that

(1) L. R. 5 H. L. 524. (2) 4 De G. & J. 340.

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it may be argued that the domicile of the members of it is a foreign one? Their whole authority to act in this matter is derived from the company, the owners of the property. It is the company that has become beneficially entitled on the death of Baron de Hirsch. Until that event the income had to be paid to him through the persons authorized by the company to do so; after that event the income is dealt with by the same persons on the same authority, but freed from the life interest. But it was argued that the domicile of the company is French because the meetings of the councillors have been held in Paris. But, according to that view, the domicile could be changed by a mere resolution to hold the meetings elsewhere, and that does not seem reasonable. The case of *Cesena Sulphur Co.* v. *Nicholson* (1) was quoted on this point. That was decided on a question whether certain profits were liable to income tax (Sched. D.) as arising to a person (or corporation) residing in the United Kingdom, and it was held that where a company registered in this country makes profits on operations carried on abroad by their agents or delegates, there being a central board of management having general control, all the profits are taxable though earned out of this country. The question was not the same as that which we have to decide, but the Court came to the opinion that the company's residence was at their principal seat of business, and that the principal seat of business was at the registered office, although the operations were carried on, with the exception of the general control, elsewhere. So far as that decision goes it is not against the view that this company was domiciled in England.

It was further put, however, and with much astuteness, that it would not be by the British Courts, nor under their jurisdiction, that this property would be administered. It is true that it would not be governed by the rules of our municipal law in all matters. Thus, by the Austrian law (as was stated to us) an Austrian father cannot divest himself of property so as to impair the rights of his children to legitim, and any

(1) 1 Ex. D. 428.

alienation at any time having that effect may, on the death of the father, be set aside to the extent to which it has that effect. The Austrian law was the law of the domicile of the deceased, and it could have been applied in this case if there had been any children. Again, if there had arisen any question upon which the French Government found that the association were working against their recognised policy, or interfering in colonies in a way not in their opinion desirable, there can hardly be any doubt that they could have enforced upon them the law of France. So could the government of any country in which the association were working; and further than that, if a proceeding were brought in England to determine such a point, it can hardly be supposed that, assuming the jurisdiction, it would not have been exercised in favour of and by reference to the laws of the country concerned. But although it is true that these and other instances may be given where the foreign law would by any tribunal be allowed to apply to the administration of this trust, is it not true also to say that, in order to fully adminster the property and to determine all questions relating to it, recourse must be had to the English tribunal? By it foreign law may have to be applied. Some instances have been given where it probably would be so, but the property is owned here by a company registered under the Companies Acts. Suppose a winding-up or dissolution—under what Court but the English Court having that jurisdiction could it be conducted? The 7th clause of the memorandum admits that. But the English law governs this company also in many other ways—such as its very name, the possible acquisition of land, or of gifts on trust, and the share capital—and although the income be administered abroad and the property is foreign in the sense of being situated abroad, it is here that it is owned. The property may be transferred from one country to another, and the council may sit in Austria or some other country; but here, until the title be altered, remains the ownership. Probably, as was stated at the bar, it was in order to gain the security given by our law that the company was constituted in England and made owner of the property.

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For these reasons I think that the Crown is entitled to judgment.

DARLING J. I will begin by stating—for it is necessary to the decision of this case—that I come to the conclusion that the Jewish Colonization Association was domiciled in England. As to Baron de Hirsch, it is admitted that he was domiciled in Austria. The effect of the deed of August 26, 1892, together with the subsequent transactions between Baron de Hirsch and the association, was that a large number of stocks, shares, bonds, and investments (for the most part representing property situate in foreign countries) were transferred to the association, and became their property. This property the association held as trustees for the benefit of a number of unascertained aliens of the Jewish race. The same deed secured to Baron de Hirsch during his life the entire income of the association to be derived from the property he had so given them. In April, 1896, Baron de Hirsch died, and the property is now held by the association upon the trusts for the benefit of the classes of persons indicated in the deed. The association to which, by means of the deed, the property was given in trust, became a company duly established in England under the Companies Acts. The registered office of the company was in London, and clause 3 of the memorandom of association shews that Baron de Hirsch desired "to assist and promote the emigration of Jews from any parts of Europe or Asia, and principally from countries in which they may for the time being be subjected to any special taxes or political or other disabilities." He further, in the event of the association being dissolved and in the last resort, entrusted to a judge of the High Court of Justice in England the selection of some other institution to benefit by his bounty. The council of administration of the association was accustomed to meet in Paris, and the association transacted most of its business in offices there. It appears by the minute of the council of administration, dated January 15, 1892, that this was done because Baron de Hirsch had offices in Paris and desired to have the business of the association conducted in those offices.

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In these circumstances the question is whether duty under the Finance Act, 1894, and Succession Duty Act, 1853, became payable by the Jewish Colonization Association upon the death of Baron de Hirsch. The question whether the association are liable to estate duty depends upon the question whether they are liable to succession duty. Now, this must be decided upon the meaning to be given to ss. 2 and 16 of the Succession Duty Act, 1853, and there can be no doubt that if the words of these sections are taken in their widest, or, indeed, in their natural, sense, then duty is payable. But it is well established that, in the words of Lord Cranworth L.C. in *Wallace* v. *Attorney-General* (1), there is necessarily an "implied limitation as to the persons liable to duty" under those sections, and many cases have been cited to us to shew what limitations ought to be implied. In the first place, it is said that this is not an English settlement or trust; yet I think it is. With every desire not to say anything invidious concerning the laws or the executive of any foreign country, and anxious not even to reflect on the Egypt of the Pharaohs, I think it sufficiently appears from the documents to which I have referred that Baron de Hirsch desired and intended, for reasons to him sufficient, to avail himself of the protection of English laws and of English courts of justice for the security of the property he gave, and of the rights of those to whom he gave it, and of the protégés of these.

Further, it is said that no duty is payable because Baron de Hirsch was of Austrian domicile. I agree that this question has a certain bearing, but I do not think it is of the importance attributed to it by Sir Robert Reid. As Lord Hatherley L.C. put it in *Attorney-General* v. *Campbell* (2): "In order to have the personal property administered you must seek the forum of that country where the person whose property is in question had acquired a domicile. Then, when you obtain possession of that property, you do all which has to be done in the country to which the testator belonged." It is true that Lord Hatherley is reported as saying, "You do all which has to be done," but I think his meaning was, "You *have done* all that was to be

(1) L. R. 1 Ch. 1. (2) L. R. 5 H. L. 524, at p. 528.

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done in the country to which the testator belonged," for he at once proceeds to say: "The question is afterwards, when the property has been so obtained and administered, and is in the state in which the testator desired it to be placed, in what condition do you find the fund?" Now, I assume that the association have taken all steps (if there were any) necessary to be taken in the country of domicile of Baron de Hirsch, or wherever the property may be locally situate, in order to acquire this property, and I assume them to have legally acquired it, for otherwise I think the question of duty payable here would not arise. It is now property which belongs to an English company by reason of such a disposition by a person of foreign domicile as renders it liable to the duties contended for. The fact that the English company are the owners of the property upon trust to apply it in a particular way in the establishment of foreign Jews does not, I think, prevent that company from being the successor, and beneficially entitled, within the meaning of the Act. There are no other individuals capable of identification as beneficially entitled until the company shall have selected them as persons to profit by Baron de Hirsch's benefaction. Moreover, this seems to be established by *Attorney-General* v. *Felce*. (1) But here it is further objected that the duties are not payable because the property is locally situate out of this country, and *Wallace* v. *Attorney-General* (2) is relied upon. True it is that in that case the property abroad was sold and the price was invested in English Consols; and naturally enough that fact is mentioned in the judgments. But I do not think it is necessary to their conclusion. Indeed, Lord Westbury says in *Attorney-General* v. *Campbell* (3): "After the purposes of administration have been answered and distribution made, if a party taking this distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property, and is no longer to be dealt with as if it was merely a portion of a foreign testator's estate to be received in the course of administration." It is true that this passage is somewhat ambiguous, and I may

(1) 10 Times L. R. 337. (2) L. R. 1 Ch. 1.
(3) L. R. 5 H. L. 524, at p. 531.

not have understood it rightly; but I am led to think that the meaning is as I have stated; for in *Lyall* v. *Lyall* (1) Lord Romilly M.R. speaks as follows of *Attorney-General* v. *Campbell* (2): "In that case their Lordships decided that when a person, whether an alien or a British subject, succeeds to property under a British settlement vested in British trustees, he is liable to pay succession duty, whether the settlement be made by an alien or a British subject, and whether the settlement be made by deed or will, and, as I understood, *wherever the property is locally situated.*" Now this exposition of the law covers, as it seems to me, every controverted doctrine in this case; and, assuming that passage to rightly state the law, concludes it in favour of the Crown; provided I am right in coming to the conclusion that this was a British settlement, and that the trustees were British because the company was British by domicile, and that the company was the trustee as such, so that the domicile of the various individual directors may be disregarded.

The case then stands thus. The words of the statute are most comprehensive, and amply sufficient to give the duties claimed. They are, however, subject to various implied limitations. Is there any decided case which limits them in such a way as to deprive them of application in this case? For my own part I can see none, unless I am wrong in taking the same view of *Attorney-General* v. *Campbell* (2) which commended itself to Lord Romilly nearly thirty years since, and which has obtained until to-day. Moreover, *Lyall* v. *Lyall* (3) was cited in the case of *In re Cigala's Settlement Trusts* (4), and is relied upon in the judgment, and not only does the Master of the Rolls (Sir George Jessel) not dissent from what Lord Romilly had said, but himself expressly declares (5) that "it is quite clear that a foreigner is taxed by the English law, though the property is actually situated abroad." Having so held, he proceeds to apply this doctrine to shares in the Bank of France, a foreign corporation.

(1) L. R. 15 Eq. 1, at p. 10.
(2) L. R. 5 H. L. 524.
(3) L. R. 15 Eq. 1.
(4) 7 Ch. D. 351.
(5) 7 Ch. D. 351, at p. 356.

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Therefore, it appears to me, we have authority for holding that in spite of every contention urged by the Jewish association they are liable to pay the duties claimed.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Tatham & Lousada.*

W. A.

C. A.
1900
July 25.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* THE JUSTICES OF WORCESTERSHIRE.

Licensing Acts—Appeal against Refusal to Renew Licence—Costs of Justices—Indemnity Costs, Right to—Mandamus—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29.

Where licensing justices, who had been served with notice of appeal against their refusal to renew a licence, had appeared at quarter sessions and acted as respondents to the appeal:—

Held, that s. 29 of the Alehouse Act, 1828, made it imperative, upon the dismissal of the appeal, for the court of quarter sessions to entertain an application by the licensing justices for an order upon the appellants to pay them such sum by way of costs as should in the opinion of the court of quarter sessions be sufficient to indemnify them from all costs and charges to which they might have been put in consequence of their having had notice of the appeal served upon them.

Reg. v. *London Justices*, [1895] 1 Q. B. 616, not followed.

APPEAL from the order of a Divisional Court (Ridley and Bigham JJ.) discharging a rule nisi for a mandamus as after mentioned.

An application for the renewal of a licence for the sale of intoxicating liquors having been refused by the justices for the city of Worcester at their general annual licensing meeting, the owners of the licensed premises appealed to the quarter sessions for the county of Worcester under the Alehouse Act, 1828, s. 27. The licensing justices, to whom notice of appeal had been given, appeared as respondents to the appeal by counsel,

who called witnesses and addressed the Court in opposition to the renewal of the licence. (1) The quarter sessions dismissed the appeal, but refused to entertain any application for an order for the payment by the appellants of costs to the respondent justices. A rule nisi was obtained on behalf of the respondent justices for a mandamus to the court of quarter sessions to enter continuances to the next quarter sessions upon the appeal and to hear and determine according to law and pursuant to the statutes in that behalf the matter of an application by the licensing justices, the respondents in the appeal, for an order adjudging that the appellants should pay to the licensing justices to whom notice of appeal had been given such sum by way of costs as should in the opinion of the court of quarter sessions be sufficient to indemnify the said justices from all costs and charges whatsoever to which they had been put in consequence of their having had served upon them notice of the appellants' intention to appeal. Upon the argument the Divisional Court discharged the rule nisi. (2)

A. Lyttelton, Q.C., and *R. W. Coventry*, for the licensing justices. Sect. 29 of the Alehouse Act, 1828, requires the court of quarter sessions in every case, where notice of appeal against the judgment of any justice in or concerning the execution of the Act shall have been given, and such appeal shall have been dismissed, to adjudge and order the appellant to pay to the justice to whom such notice of appeal shall have been given, or to whomsoever he shall appoint, such sum by way of costs as shall in the opinion of the court of quarter sessions be

(1) The terms "appellants" and "respondents" are used throughout in reference to the appeal at quarter sessions.

(2) It should perhaps be stated that the judgment of the Divisional Court did not turn on the point reported in the text. They discharged the rule for a mandamus on the ground that there had not been a sufficient demand on the part of the respondent justices for the exercise by the quarter sessions of their jurisdiction to give costs under s. 29 of the Alehouse Act, 1828. The Court of Appeal put a different construction on what had taken place at the quarter sessions with regard to the question of costs from that adopted by the Divisional Court, and held that there had been a sufficient demand. The facts and arguments with regard to this point are not stated in the text, as the point was not considered reportable.

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sufficient to indemnify the justice from all cost and charge whatsoever to which he may have been put in consequence of his having had notice of appeal served upon him. The provisions of the section are imperative, and give no discretion to the quarter sessions as to whether they will allow the costs therein mentioned. This section applies quite irrespectively of the question whether the justices are or have acted as parties to the appeal, and entitles the justices in every case, if the appeal is dismissed, to the indemnity costs mentioned in the section. The only authority to the contrary is a dictum in the case of *Reg.* v. *London Justices.* (1)

[A. L. SMITH L.J. That case was decided upon the view that licensing justices were a court of summary jurisdiction within the meaning of the Summary Jurisdiction Act, 1879, but the basis of that decision has been swept away by the judgment of the House of Lords in *Boulter* v. *Kent Justices* (2), where it was held that licensing justices are not a court of summary jurisdiction, and that s. 31 of that Act did not apply.]

Foote, Q.C., and *J. B. Matthews*, for the appellants. The costs of the justices contemplated under s. 29 are not the party and party costs of the appeal, but something wholly different. The licensing justices need not appear or act as parties to the appeal. It is submitted that what the legislation on the subject contemplates is that ordinarily the objector to the renewal of the licence will go to the quarter sessions and fight the appeal there just as the case was fought before the licensing justices. All that *Boulter* v. *Kent Justices* (2) decided was that the licensing justices are not a court of summary jurisdiction; and the objector is therefore not a "party" within the meaning of the provisions of the Summary Jurisdiction Act, 1879, s. 31, and cannot have an order for costs made either in his favour or against him. The decision in that case has really nothing to do with the right of the objector to appear on the appeal. The section relating to party and party costs of the appeal is s. 27 of the Alehouse Act, 1828. That, therefore, is the section applicable as regards the costs of justices who have appeared as

(1) [1895] 1 Q. B. 616. (2) [1897] A. C. 556.

parties to the appeal, and the question whether those costs shall be given is entirely in the discretion of the quarter sessions. The provisions of that section as to costs cannot possibly be construed as applying only to costs of appeals against convictions. Sect. 29 is intended to provide for costs which may be incurred in consequence of the service of the notice of appeal by justices who do not appear as parties at quarter sessions. The case of *Boulter* v. *Kent Justices* (1) does not touch the construction of s. 27 of the Alehouse Act, 1828, and the position of the licensing justices with regard to an appeal against the refusal to renew a licence is not in any way affected by that decision. It is submitted that the ratio decidendi in *Reg.* v. *London Justices* (2) was that s. 29 does not apply to the costs of justices who appear as litigant parties to the appeal, but that s. 27 applies to those costs.

Roskill appeared for the justices of Worcestershire.

A. L. SMITH L.J. I agree with the appellants' counsel that s. 27 and s. 29 of the Alehouse Act, 1828, deal with different matters and different kinds of costs. We have in this case only to deal with the question of costs under s. 29. That section provides that "in every case where notice of appeal against the judgment of any justice in or concerning the execution of this Act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been confirmed, or such appeal shall have been abandoned, it shall be lawful for the Court to whom such appeal shall have been made or intended to be made, and such Court is hereby required, to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum by way of costs as shall in the opinion of such Court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal." The section renders it, in my opinion, imperative on the court of quarter

(1) [1897] A. C. 556. (2) [1895] 1 Q. B. 616.

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sessions, upon the event therein specified happening, namely, the dismissal of the appeal, to adjudge and order the appellant to pay to the justices the indemnity costs therein mentioned. It has been argued that the licensing justices in this case never asked the court of quarter sessions to give them an order for payment of these indemnity costs under s. 29, but that they only applied for an order for party and party costs under s. 27; and, therefore, there has been no such demand and refusal as is necessary before an application for a mandamus can be entertained. I do not think that this is the true view of what took place at the sessions. It appears to me that the application made on behalf of the licensing justices with regard to costs must be taken to have included any costs to which they were by law entitled, and that the refusal of the Court to order any costs against the appellants amounted to a refusal to entertain any application for an order for costs under s. 29. I think that with regard to costs under s. 29 the court of quarter sessions had no discretion, but the justices were entitled to them. In my opinion the appeal should be allowed, and the rule for a mandamus to the court of quarter sessions in the terms asked for should be made absolute.

VAUGHAN WILLIAMS L.J. agreed.

Appeal allowed.

Solicitors for appellants: *Smiles & Co., for A. H. Halford, Worcester.*

Solicitors for respondents: *Church, Rendell & Co., for Samuel Southall, Worcester.*

E. L.

SION COLLEGE, Appellants; LONDON CORPORATION, Respondents. 1900 *June* 19.

Statute—Implied Repeal—Exemption from Taxes and Assessments—City of London—7 Geo. 3, c. 37, s. 51 (Local)—11 & 12 Vict. c. clxiii., s. 169 (Local).

Sect. 51 of 7 Geo. 3, c. 37, provided that certain lands in the City of London, reclaimed from the Thames, should vest in the adjoining owners "free from all taxes and assessments whatsoever."

Sect. 169 of 11 & 12 Vict. c. clxiii., provides that a rate for the purposes of the Act shall be made upon every occupier of houses or buildings in the City, "whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place or otherwise":—

Held, that the provisions of the later Act repealed by implication the exemption from rates given by the earlier Act.

Special Case, stated upon an appeal to quarter sessions by consent and by order of a judge at chambers, under s. 11 of 12 & 13 Vict. c. 35.

On April 23, 1889, the respondents, acting in pursuance of the City of London Sewers Acts, 1848 (1) and 1857, and the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), and the Acts amending the same, made a consolidated rate for the year 1899 at 2*s.* 5*d.* in the pound (including 1*s.* 2*d.* for the school board). The appellants were assessed in respect of all the premises which they occupied. A part of those premises, consisting of buildings, was upon land which had been reclaimed from the river Thames under the statute 7 Geo. 3, c. 37, and the questions arising on this appeal were solely with regard to

(1) 11 & 12 Vict. c. clxiii., s. 169: "Every such rate shall be made by the alderman or his deputy and the major part of the common councilmen of each ward upon every person who shall inhabit, hold, occupy, possess, or enjoy any house or building within the City, or partly within and partly without the City (whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place or otherwise) according to the full net annual value thereof respectively."

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that part of the appellants' premises. The appellants acquired their premises in 1886, and from that time, until the rate in question, they had not in fact been assessed in respect of the part of the premises in question.

The appellants appealed against the rate on the ground that the part of the premises in question was exempt by 7 Geo. 3, c. 37 (1), from all rates, taxes, and assessments whatsoever, including the rates made under the said Acts.

The question for the opinion of the Court was whether the part of the premises in question was entitled to exemption from the consolidated rate, or any part thereof, by virtue of 7 Geo. 3, c. 37, or was not so exempt.

H. Avory, for the appellants. The exemption from rates contained in 7 Geo. 3, c. 37, is not repealed, either expressly or impliedly, by s. 169 of the City of London Sewers Act, 1848. The exemption taken away by s. 169 is with respect to persons living in precincts and extra-parochial places, and the words "or otherwise" must refer to something "ejusdem generis." The well-established rule is that a subsequent local Act does not repeal a privilege or exemption contained in a prior local Act, unless there are words in the later Act indicating an intention to that effect: *Garnett* v. *Bradley*. (2) In the Act of 1848 there is an express repeal of some statutes, but there is no mention of the Act of 7 Geo. 3. The principle of *Thorpe* v. *Adams* (3), therefore, applies.

The exemption in the earlier Act was not by reason of the land being situate in any particular place, but by reason of the express provisions of s. 51, and therefore was not an exemption ejusdem generis as the exemptions specified in s. 169 of the Act of 1848. By 6 & 7 Vict. c. 36, literary and scientific societies are exempt from rates, and it cannot be contended

(1) 7 Geo. 3, c. 37, s. 51: "The ground and soil of the said river so to be inclosed and embanked, in the front of every such respective wharf or ground . . . . shall vest and the same is hereby vested in the owner or owners, proprietor or proprietors, of such adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, free from all taxes and assessments whatsoever."

(2) (1878) 3 App. Cas. 944, 967.

(3) (1871) L. R. 6 C. P. 125.

that the general words of the subsequent Act of 1848 have taken away that exemption: *Liverpool Library* v. *Mayor, &c., of Liverpool.* (1)

Danckwerts, Q.C., for the respondents. The exemption created by s. 51 of 7 Geo. 3, c. 37, was only in respect of their existing taxes and assessments, and was not intended to apply to future impositions. In *Eddington* v. *Borman* (2) it was decided that the land exempted by s. 51 of 7 Geo. 3, c. 37, was exempt from the rates imposed under the subsequent Act of 11 Geo. 3, c. 29, upon the ground that only premises liable to the poor-rate were liable to be assessed under the later Act. The case there referred to, *Williams* v. *Pritchard* (3), in which it was held that a subsequent Land Tax Act did not take away this exemption, was decided upon the ground that the Act was merely an annual Act which reimposed a long-established tax. So also, with respect to the poor-rate, it was held, in *Rex* v. *London Gas Light Co.* (4), that the exemption from poor-rate was not taken away by subsequent Acts which merely altered the mode of making and raising poor-rates. In *Perchard* v. *Heywood* (5) it was held that the lands in question were not exempt from the inhabited house duty imposed by subsequent Acts. The Act of 1848 repealed the earlier Acts relating to the lighting and sewering of the City, and it had then been decided that this land was exempt under 7 Geo. 3, c. 37, from taxation under those Acts because it was exempt from poor-rate, and that explains why, in s. 169 of the Act of 1848, the rate is imposed upon every occupier, whether liable to poor-rate or not, and shews that it was intended to take away such an exemption as this.

Avory, in reply. The Act of 1848 did not impose taxation of an entirely new kind; for there was lighting and sewering before the Act of 7 Geo. 3; and, therefore, the point that the Act only gave exemption in respect of then existing impositions is of no avail; the mere changing of the name of the imposition cannot affect the exemption. The exemption is from all

(1) (1860) 5 H. & N. 526.
(2) (1790) 4 T. R. 4.
(3) (1790) 4 T. R. 2; 2 R. R. 310.
(4) (1828) 8 B. & C. 54.
(5) (1800) 8 T. R. 468.

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local taxation, whether present or future, unless there is a clear repeal, although there may be a distinction in the case of subsequent imperial taxation. If the words "or otherwise" in s. 169 were wide enough to take away all exemptions, the subsequent sections expressly taking away other exemptions would have been unnecessary.

GRANTHAM J. This is a case of some difficulty. I think that it is perhaps unfortunate that words were not used which would make it quite clear that it was intended to take away the exemption which attached to this land. I think, however, looking at the somewhat analogous cases which have been decided, that we are bound to follow the general view of those cases, namely, that the words "taxes and assessments," from which the land in question was exempted by 7 Geo. 3, c. 37, include only taxes and assessments of a kind which were then assessed, such as the poor-rate. Now, ought we to hold that this Act, which freed this land from all taxes and assessments, would preclude the authorities from levying any kind of rate upon the land in future? Since that Act many things have been provided in respect of which rates are levied, such as education, and the modern system of sewering and lighting. I think that it would not be fair to exempt this land from rates for such purposes, and that it would require very clear language to shew that it was intended to do so. I think that it was intended to make the land liable, and to do away with any exemption which might have previously existed under 7 Geo. 3, c. 37. In the Act of 1848 (11 & 12 Vict. c. clxiii.) the preamble, after reciting various Acts providing for some drainage, lighting, and paving of London, recites that "some of the powers and provisions of the said recited Acts have been found insufficient for the purposes intended, and it is expedient that the said powers should be altered and amended, and other powers granted for the purposes aforesaid and for the sanitary improvement of the City of London." For those purposes the corporation have to raise money, and s. 169 gives them that power, and provides that a rate shall be made upon every occupier in the City "whether such person shall be now liable

in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place, or otherwise." Now, I think that upon the authorities, and particularly *Perchard* v. *Heywood* (1), we should have great difficulty in holding that it was not intended by that section, apart from the proviso, to make every person liable to this rate whether he had any exemption in the past under such an Act as 7 Geo. 3, c. 37, or not. But there are the further words of the proviso which, apart from the cases, justify us in holding that it was intended to make this property liable to the rate. I think that the words "or otherwise" are wide enough to cover such an exemption as this. Although the case is not free from doubt, particularly remembering the judgment of Lord Blackburn in *Garnett* v. *Bradley* (2), I still think that when this Act was passed it was intended to bring within the area of rateability land which previously had the privilege of being exempt under 7 Geo. 3, c. 37, from all the rates existing at that time.

CHANNELL J. I am of the same opinion. I think that the case is one of considerable difficulty. The three cases which have been referred to—*Williams* v. *Pritchard* (3), *Eddington* v. *Borman* (4), and *Rex* v. *London Gas Light Co.* (5)—require a good deal of consideration when one has to construe the Act 7 Geo. 3, and to my mind they shew that the true construction of it is that it was intended to relieve the reclaimed land from all rates and taxes which then existed and would, in the ordinary course of things, from time to time be created, and that it was intended to relieve them from those burdens even though the form of the burden might be changed to some extent from time to time. The Act was a special local Act, and its construction, and the way in which it would be affected by subsequent legislation, would be as laid down in recent times by Lord Blackburn in *Garnett* v. *Bradley*. (2) Something of

(1) 8 T. R. 468.
(2) 3 App. Cas. 944, 967.
(3) 4 T. R. 2; 2 R. R. 310.
(4) 4 T. R. 4.
(5) 8 B. & C. 54.

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Channell J.

the same kind was said by Lord Kenyon in *Williams* v. *Pritchard* (1), though I think that he stated the proposition rather differently from that which is now held to be the correct proposition. He said: "It cannot be contended that a subsequent Act of Parliament will not control the provisions of a prior statute, if it were intended to have that operation, but there are several cases in the books to shew that, where the intention of the Legislature was apparent that the subsequent Act should not have such an operation, there, even though the words of such statute, taken strictly and grammatically, would repeal a former Act, the courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction." Applying those principles, there are various ways of finding whether there is an intention sufficiently indicated to take away the operation of the earlier Act with the exemption therein conferred. If there is an entirely new benefit conferred by the subsequent Act upon the hereditament, I should think that that would be sufficient of itself to shew an intention, by the general words, to make every one who got the benefit pay for it. I do not, however, think that the present case is as strong as that. It may be that the benefits provided by the Act of 1848, which were to be paid for out of the consolidated rate, were to some extent in excess of those which the occupiers of houses and buildings had enjoyed before, but I think that they were of a similar nature. There always was, I believe, a certain amount of lighting in the City, and the recital in this Act shews that there were things called sewers as long ago as the time of Charles II., so that I doubt whether there is enough in the Act of 1848 in the way of new benefits to enable us to say that the former exemptions were done away with. I rely, however, upon the fact that, in s. 169 of the Act of 1848, there is indicated an express intention to do away with exemptions. That seems to me to be very important. Sect. 169 provides that the rate shall be made upon "every person who shall inhabit, hold, occupy, possess, or enjoy any house or building within the city." If the section stopped there, in my opinion it would not be sufficient to take away this exemption. Then the section proceeds: "whether such

(1) 4 T. R. 2; 2 R. R. 310.

person shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable to be assessed to the relief of the poor in respect thereof." That might be sufficient to take away the ground upon which this exemption was based in *Eddington* v. *Borman*. (1) Now, is the effect of those words cut down by anything which follows? The next words are, "by reason of such house or building being situate in any precinct or extra-parochial place." If the section stopped there, it would certainly cut down the effect of the preceding words; but it goes on, "or otherwise." Those words "or otherwise" must refer to something analogous, and the principle of "ejusdem generis" must be applied. Is not this exemption "ejusdem generis"? This is a local exemption of a certain area which is in fact within the City, but was a part of the City which at that time was exempt from being assessed to the relief of the poor. It was not exempt because it was within a precinct or an extra-parochial place, but by reason of its situation, and that is in my opinion entirely analogous to the exemption of the precinct and extra-parochial place. Upon the whole, therefore, I think that there is in the Act of 1848 enough to override the earlier statute. I think that some difficulty is created by the illustration of the case of literary and scientific societies. That case has been expressly decided in *Liverpool Library* v. *Mayor, &c., of Liverpool* (2) on a slightly different, but analogous, statute. I must assume, therefore, that the fact that the exemption there was under a public Act is sufficient to distinguish that case from the present. Whether that is so or not, I decide the case now before us upon the ground that there is indicated in the Act of 1848 a sufficient intention to override the exemption in the earlier Act. Upon that ground our judgment must be for the respondents.

Judgment for the respondents.

Solicitors for appellants: *Clark, Rawlins & Co.*
Solicitor for respondents: *Sir H. H. Crawford.*

(1) 4 T. R. 4. (2) 5 H. & N. 526.

W. A.

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July 24.

[IN THE COURT OF APPEAL.]

BARON AND ANOTHER *v.* PORTSLADE URBAN DISTRICT COUNCIL.

Local Government—Sewers—Duty of Local Authority to cleanse Sewers—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 19, 299.

Sect. 299 of the Public Health Act, 1875, in providing for complaint to the Local Government Board where a local authority has made default in the maintenance of existing sewers, does not apply to s. 19 of the Act, which imposes on local authorities the duty to cleanse sewers vested in them, and consequently does not affect the right of action of a person who has sustained damage through the negligence of a local authority in not cleansing a sewer vested in them.

APPEAL from a judgment of Mathew J. on further consideration.

The plaintiffs were the occupiers of a dwelling-house and land at Portslade, and the defendants were the urban district council for the district in which the premises were situated. The action was brought to recover damages for trespass to the land of the plaintiffs and injury to them in their occupation of the dwelling-house and land, alleged to arise from the negligence of the defendants in not keeping in a proper state certain drains and sewers vested in them and which they were bound to keep in proper condition.

A sewer was constructed forty years ago by private persons to drain a brewery and some cottages. The first part of the sewer was underground, but the remainder was an open sewer which ran into a pond on the plaintiffs' premises. Before the constitution of the defendants as local authority, the former local authority cleared out the open sewer and placed that which was dug out on the land. When the sewer was properly cleansed in this manner it was sufficient for the requirements of the locality and no nuisance was created. In 1898 the urban district was formed and the defendants became the local authority. A dispute arose as to the clearing out of

the sewer, and the attention of the defendants was called to its condition and to the fact that it was a nuisance, but nothing was done by them. The plaintiffs thereupon brought this action, and the jury assessed the damages caused to the plaintiffs by the negligence of the defendants at 75*l*.

On further consideration the learned judge held that there was evidence of negligence; that s. 299 of the Public Health Act, 1875, in dealing with the maintenance of sewers, does not apply to the duty of cleansing sewers imposed by s. 19 of the Act upon the local authority in whom they are vested; and consequently did not deprive the plaintiffs of their right of action against the defendants as local authority; and he gave judgment for the plaintiffs for the amount of damages assessed by the jury.

The defendants appealed.

Macmorran, Q.C., and *Thorn Drury*, for the defendants. The question is whether the plaintiffs have any right of action against the defendants. Sect. 19 of the Public Health Act, 1875, imposes the duty on the local authority of keeping the sewers belonging to them so that they shall not be a nuisance or injurious to health. But that section must be read in conjunction with s. 299, which provides a remedy for default by a local authority "in the maintenance of existing sewers." That provision covers the present case, and any remedy of the person aggrieved other than that provided by s. 299 is excluded: *Robinson* v. *Workington Corporation* (1); *Peebles* v. *Oswaldtwistle Urban Council* (2); *Pasmore* v. *Oswaldtwistle Urban Council.* (3) The defendants had nothing to do with the construction of the sewer, and they have done nothing to increase the burden upon it; there has simply been a failure to carry out a duty imposed by the Act. That amounts only to nonfeasance, and no action will lie: *Attorney-General* v. *Dorking Union.* (4) That case is very similar to the present one. In both there were prescriptive rights to use the sewer,

(1) [1897] 1 Q. B. 619.
(2) [1897] 1 Q. B. 625.
(3) [1898] A. C. 387.
(4) (1882) 20 Ch. D. 595.

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and a nuisance was caused by a discharge from the sewer, and it had not been constructed or interfered with by the local authority, who only permitted it to be used as formerly.

[They also cited *Brown* v. *Dunstable Corporation* (1) and *Dent* v. *Bournemouth Corporation*. (2)]

Witt, Q.C. (with him *Sinclair Cox*, and *Lampard*), was not called on to argue.

EARL OF HALSBURY L.C. According to the view I take of the law, I adopt and apply to this case that which has been laid down in the cases cited to us. The matter before us arises in this way. There is a sewer vested in a local authority, and according to the practice that prevailed up to a certain time the local authority cleansed the sewer at intervals, and no nuisance was caused. The local authority, however, discontinued that practice which had been the usual course taken, and in consequence a nuisance was caused on the lands in the plaintiffs' possession. There seems to me to be a wide difference between the obligation or duty to construct a new system of drainage and the obligation on the local authority to use sewers that are vested in them in a proper and reasonable manner. In this case there is no question as to providing any new sewer. The sewer is in existence and under the control of the local authority. The plaintiffs complain that the existing sewer, which from time to time has been cleaned out, is now neglected and uncleansed, and that this has caused a nuisance. I do not see how the local authority can escape the obligation on them to use their sewers in a reasonable manner. It seems to me that s. 299 of the Public Health Act, 1875, is quite susceptible of the construction placed upon it by the learned judge in the Court below. The first part of the clause which deals with the provision of sufficient sewers obviously refers to the creation of new works, and the only difficulty which can arise is under the later words of the clause which deal with the maintenance of existing sewers. I agree with the learned judge that the maintenance of a sewer is not the

(1) [1899] 2 Ch. 378. (2) (1897) 66 L. J. (Q.B.) 395.

same thing as that which it is the duty of the local authority to do by virtue of s. 19—that is, to keep the sewer so that it shall not be a nuisance or injurious to health, and to see that it is properly cleansed and emptied. Sect. 299 does not, in my opinion, touch the duty of the local authority to use proper diligence in the management of existing sewers, and I cannot see either in the section or in the cases cited anything to take away the right of action of a person who has sustained an injury through the neglect of the local authority.

A. L. SMITH and VAUGHAN WILLIAMS L.JJ. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Rodgers & Gilbert.*

Solicitors for defendants: *Biggs-Roche, Sawyer & Co., for J. C. Buckwell & Berkeley, Brighton.*

A. M.

[IN THE COURT OF APPEAL.]

THE VESTRY OF ST. MARYLEBONE *v.* THE SHERIFF OF LONDON.

Sheriff—Seizure of Goods of Person liable to pay Rates—Goods "taken in Execution"—Duty of Sheriff to pay Rates—35 Geo. 3, c. 73—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 161, 250.

By a local Act, where in a certain metropolitan parish the goods of any person liable to pay a rate by virtue of the Act shall have been "taken in execution" by a sheriff before the rate shall have been paid, the sheriff upon demand by the rate-collector is "directed and required in the first place" to pay the rate to the collector; and by the Metropolis Management Act, 1855, the vestry of the parish are to have, for the purpose of levying the rates therein mentioned, the same powers, remedies, and privileges as for levying money for the relief of the poor.

A sheriff seized under a fi. fa. the goods of a judgment debtor who was liable to pay to the vestry, as the rating authority of the parish, a certain rate made up of a poor-rate by virtue of the local Act and a general rate under the Metropolis Management Act, 1855. A demand was made on the sheriff by the rate-collector for the amount of the rate; but the sheriff,

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having subsequently received from the debtor the amount of the judgment debt, withdrew from possession without having paid the rate:—

Held, that the goods had been taken in execution within the meaning of the local Act, and that the sheriff was liable to the vestry for the amount of the rate.

Judgment of Bigham J., [1900] 1 Q. B. 111, affirmed.

APPEAL from the judgment of Bigham J. at the trial without a jury, reported [1900] 1 Q. B. 111.

The plaintiffs' claim was for 18*l.* 19*s.* 3*d.*, payable by the defendant to them under and by virtue of s. 195 of 35 Geo. 3, c. 73 (1), in respect of rates due to the plaintiffs from one T. M. Bush, whose goods had been taken in execution by the defendant as sheriff of London.

On April 21, 1898, the plaintiffs made a rate (comprising a poor-rate and a general rate) under and by virtue of 35 Geo. 3, c. 73, and the Metropolis Management Act, 1855; and on November 24, 1898, the sum of 18*l.* 19*s.* 3*d.* was payable by Bush in respect of that rate. At that date, the defendant as sheriff of London was in possession of the goods, chattels, and effects of Bush, which he had seized under a writ of fi. fa.

Whilst the defendant was in possession of the goods, a written demand was made by the collector to the plaintiffs upon the defendant to pay to the plaintiffs the rate then payable by Bush. The amount so demanded was less than the value of the goods seized by the defendant. On November 25, before the goods seized had been sold or removed from the premises, Bush paid to the defendant the amount of the

(1) 35 Geo. 3, c. 73, s. 195: "When, and as often as, the goods, chattels, and effects of any person or persons liable to pay any rate or assessment by virtue of this Act shall be taken in execution within the limits aforesaid by any sheriff or other officer, before such rate or rates assessment or assessments shall have been paid, then the said sheriff or other officer, upon demand made by the collector or collectors for the time being to the said vestrymen, shall and he is hereby directed and required in the first place to pay to such collector or collectors such rate or rates assessment or assessments so made as aforesaid, and which shall not have been paid by such person or persons, and all arrear or arrears due thereon. Provided always that nothing herein contained shall extend or be construed to extend so as to charge such sheriff or other officer with the payment of more than one year's rate, or of a larger sum of money than the value of the goods, chattels, and effects so taken in execution."

judgment debt, and the defendant, having handed this amount to the judgment creditor, withdrew from possession of the goods without having paid the rate.

The learned judge gave judgment for the plaintiffs. (1)

The defendant appealed.

A. T. Lawrence, Q.C., and *P. Rose-Innes*, for the defendant. The goods were not "taken in execution" within the meaning of the local Act, for they were only seized and not realized by sale. There is no difference between goods "taken in execution" and goods taken "by virtue of an execution." The latter words are those of 8 Anne, c. 14, s. 1, and the cases shew that under them the goods must have been removed or sold by the sheriff: *Riseley* v. *Ryle* (2); *In re M'Carthy*. (3) The local Act was superseded by the Metropolis Management Act, 1855, which created a new parochial authority: *Paddington Vestry* v. *Great Western Railway*. (4) There was no levy of rates under the local Act, for the power to levy rates was given by the statute of Elizabeth, and the new vestries derive their authority from that Act. Sect. 195 of the local Act is not incorporated in the Act of 1855, and if there was any power to demand the amount of the rate from the sheriff it is not applicable to the general rate levied under the Metropolis Management Act, 1855.

English Harrison, Q.C., and *Herbert Nield*, for the plaintiffs. Under s. 8 of the Metropolis Management Act, 1855, the new vestries take the place of the old and exercise the same powers. There is a continuity of authority with regard to the levy of poor-rates, and the new vestry levy them under the local Act, and have the privileges given by s. 195 of that Act. Then s. 161 of the Act of 1855 gives the same privileges with regard to the general rate levied under that Act, and among them is the right to demand the rate from a sheriff in possession of the goods of the person who owes it.

The decisions on the statute of Anne do not govern the

(1) [1900] 1 Q. B. 111.
(2) (1843) 11 M. & W. 16.
(3) (1881) 7 L. R. (Ir.) (Ch.) 473.
(4) (1858) 28 L. J. (M.C.) 59, at p. 64.

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interpretation of the words "taken in execution" in the local Act.

A. T. Lawrence, Q.C., in reply.

A. L. SMITH L.J. This is an appeal from a judgment of my brother Bigham. The first point raised is as to the meaning of the words "taken in execution," and it seems to me that the obvious meaning of the words is that when a sheriff goes into possession on a writ of fi. fa. the goods that he seizes are taken in execution, and the Act is applicable to them. Then, after the goods had been taken in execution and while they were in the possession of the sheriff, he had notice that the execution debtor was liable to pay certain rates. The next day the judgment debtor produced money to satisfy the judgment debt, and the sheriff handed the amount to the judgment creditor and withdrew from possession. The parochial authorities contend that the sheriff has neglected the duty cast on him by the Act because, after notice of the fact that rates were due, he has not paid them to the collector, and they say that the damages that they have sustained are measured by the amount which ought to have been handed to their collector. The argument against the liability of the sheriff is based on this—that the person whose goods were taken in execution was not liable to pay any rates "under this Act"—that is, under the local Act. It appears from a document which has been handed to us that the whole amount demanded by the collector is made up under two different headings. The first is for poor-rate under the local Act; and as to that I ask myself, where has the local Act been repealed? The Metropolis Management Act, 1855, does not deal with poor-rates, though it has substituted a new general rate for some of the old ones. I see no repeal of the power of the vestry to levy a poor-rate under the old Act, and, therefore, to that extent the claim of the collector was right, since the owner of the goods taken in execution was liable under the local Act. As to the other part of the sum demanded, the demand was for rates leviable under the Metropolis Management Act, 1855. But that does not assist the defendant, for s. 161 of that Act, which gives the overseers—

that is, in this case the vestry—the power to collect general rates, contains a clause which I read as my brother Bigham read it. It says: "The said overseers shall for the purpose of levying such rates proceed in the same manner and have the same powers, remedies, and privileges as for levying money for relief of the poor." One of these privileges is the power to give notice to a sheriff who has seized goods that the owner owes rates, and to require the sheriff to pay them on the demand of the collector. In my opinion, the decision of the learned judge was right, and this appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I entirely agree. So far as the demand on the sheriff was in respect of rates other than poor-rates, s. 161 of the Metropolis Management Act, 1855, is fatal to the argument put forward on behalf of the defendant, unless the words of that section can be limited by construing them as only referring to powers and privileges exercised generally by overseers, and as excluding powers given locally by local acts. Once come to the conclusion that no such limit can be placed on the words, then it is clear that the plaintiffs were within their rights in demanding the general as well as the poor rate.

As to the other question—whether the goods were taken in execution—that which was done in the case cited was to construe the words "taken by virtue of an execution" in the statute of Anne, and we are invited to construe the words "taken in execution" in the same manner. There is no ground for this, because the words of the statute of Anne were construed with reference to the rest of the words of the section, and in particular the word "removal." It was held that the object of the statute was to prevent the removal of the tenant's goods without payment to the landlord of the rent due to him, and the section was construed so as to carry out that object. The decisions on that statute are not applicable to the present case. With regard to the amount claimed by the plaintiffs, the words of the proviso, which provide that the sheriff shall not be liable beyond the value of the goods taken in execution, make it clear that the sheriff is liable to make good the loss of the plaintiffs up to the value of the goods taken in execution.

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ROMER L.J. I agree. I cannot help thinking that the point in this case has already been decided in *Vaughan* v. *Imray* (1), because there it was held that under the Metropolis Management Act, 1855, the power of making poor-rates possessed by the old vestries scheduled in the Act had been transferred to the new vestries. Then see how matters stood after the year 1855. The vestry of the parish of St. Marylebone, which was one of those scheduled, retained all the powers given to them by the local Act of levying a poor-rate, and any levy was under and by virtue of the local Act of 1795. The right conferred by s. 195 of that Act was a privilege of the overseers levying a poor-rate. It was a means of getting payment of the rate through the collector, who was a servant of the vestry. Then s. 161 of the Metropolis Management Act, 1855, came into operation, and gave to the vestry, with regard to a general rate under that Act, the same rights and privileges that they had with regard to a poor-rate, so that the whole rate due in this case could be demanded of the sheriff, and should have been paid by him.

Appeal dismissed.

Solicitors for plaintiffs: *Clarkson, Greenwells & Co.*
Solicitors for defendant: *W. & T. Burchell.*

(1) (1859) 28 L. J. (M.C.) 78.

A. M.

Distinguished. R. *v.* CLUCAS. [1949] 2 All E.R. 40.

Distinguished. REX *v.* CLUCAS. [1949] 2 K. B. 226

[CROWN CASES RESERVED.]

1900
July 28.

THE QUEEN *v.* BUTTON.

Criminal Law—False Pretences—Athletic Sports—Competitor in Handicap—False Statements as to Name and Performances—Attempt to obtain Prize.

On the trial of an indictment for attempting to obtain property by false pretences the following facts were proved.

Entries for two handicaps were sent to the secretary of an athletic meeting, in the name of Sims, containing statements as to the recent performances of Sims, which were very moderate, and in consequence Sims was given long starts. The entries were not written by either Sims or the prisoner. At the meeting the prisoner, who was a good runner, personated Sims, who was absent, and came in first in both races. After the first race the handicapper asked the prisoner whether he was really Sims, whether the performance given in the entry form was really his, and whether he had never won a race, as stated in the entry. He answered these questions, falsely, in the affirmative.

On a case stated:—

Held, that the attempt to obtain the prizes was not too remote from the pretence, that the case was rightly left to the jury, and the prisoner was properly convicted.

Reg. v. *Larner*, (1880) 14 Cox C. C. 497, disapproved.

CASE stated by the recorder of Lincoln.

The prisoner was charged with attempting to obtain goods by false pretences.

On August 26, 1899, there were athletic sports at Lincoln, for which prizes were given. Among the contests were a 120 yards race and a 440 yards race, in respect of each of which a prize was given of the value of ten guineas.

Among the names sent in for these two contests was the name of "Sims, C., Thames Ironworks A. C.," and two written forms of entry were sent in to the secretary of the sports, containing (as appeared to be usual) a statement as to the last four races in which Sims had run, together with a statement that he had never won a race. These forms were not sent by Sims, nor were they in his handwriting, and he knew nothing of them. They were however signed in his proper name, and

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with his true address, and contained a correct account of his last four performances. The forms were proved to be not written by the prisoner.

The performances of Sims were very moderate, and, as a fact, he was only a moderate runner, and as a result the supposed Sims was given by the handicapper of the sports a start of 11 yards in the 120 yards race and a start of 33 yards in the 440 yards race.

Sims was ill at Erith when the races were run, and was not at Lincoln at all, and he was personated by the prisoner, who was a fine performer and won both contests very easily.

The suspicion of the handicapper being aroused, he asked the prisoner, after the 120 yards race, whether he was really Sims, whether the performance given in the entry form was really his, and whether he had never won a race. To these questions the prisoner answered that he was Sims, that the performances were his own, and that he had never won a race. All these statements were untrue, and in particular he had won a race at Erith in his own name. The handicapper was called as a witness, and swore that he would not have given the prisoner such favourable starts if he had known his true name and performances.

These facts were all admitted, and no evidence was called to contradict them. It was, however, suggested for the defence that the prisoner might have done it for "a lark," or might have possibly done it in order to keep himself in good training. In summing up the case to the jury the recorder told them that if the prisoner did it for "a lark," without any criminal intent, and without intending to get the prizes, they ought to find him not guilty; but that if he made the false representations wilfully, intentionally, and fraudulently, with intent to obtain the prizes, they ought to find him guilty of attempting to obtain them by false pretences.

The jury found a verdict of guilty.

It was contended for the prisoner that, on the authority of *Reg.* v. *Larner* (1), the obtaining the prizes was too remote from the false representation and that he ought to be acquitted.

(1) 14 Cox C. C. 497.

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The recorder overruled the objection, but agreed to state this case. A case decided by Lord Lindley at Nottingham Assizes (1) appeared to be contrary to *Reg.* v. *Larner*. (2)

The questions of law for the opinion of the Court were :—

(1.) Whether the recorder had summed up the case correctly to the jury.

(2.) Whether the attempt to obtain the prizes was too remote from the pretence.

J. Percival Hughes, for the defendant. The conviction is bad. There was no completed criminal offence, for, assuming that the defendant did make the representations alleged for the purpose of obtaining a longer start in the handicaps than he would have got if he had entered in his own name, and disclosed his previous performances truthfully, still there is nothing to shew that he may not have done what he did for amusement, or to keep himself in training, for it is not shewn that he ever applied for the prizes, and even if in the first instance he intended to get the prizes, which is not clearly shewn, still until he applied for them there was a locus pœnitentiæ, and he might never have taken the prizes at all.

[MATHEW J. Those are questions of fact, and the verdict of the jury negatives the suggestions on behalf of the defendant.]

The intention to obtain the prizes is too remote from the representations. What he really obtained was more favourable terms in the handicaps. He came in first owing to his good running. *Reg.* v. *Larner* (2) is a strong authority against the conviction. [He also referred to *Reg.* v. *Eagleton* (3); *Reg.* v. *Gardner*. (4)]

Montague Shearman (*T. Hollis Walker* with him), for the prosecution, was not called on.

MATHEW J. The conviction in this case must be upheld. The case of *Reg.* v. *Larner* (2) is relied upon as an authority

(1) *Reg.* v. *Dickenson*, (1879) Roscoe's Criminal Evidence, 432, 433, 12th ed.; 2 Russell on Crimes, Book III., cap. xxxii., s. ii., p. 511, 6th ed.; *Times* of July 26, 1879.

(2) 14 Cox C. C. 497.

(3) (1855) 6 Cox C. C. 559; 24 L. J. (M.C.) 158.

(4) (1856) 7 Cox C. C. 136; Dears. & B. C. C. 40.

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Mathew J.

for the defendant. In that case the question was one of fact, and the Common Serjeant directed the jury according to his impression of the view of the law taken by Stephen J., whom it appears from the report he had consulted; but that case is contrary to the ruling of Lord Lindley in a case tried before him at the Nottingham Assizes (1), and I am clearly of opinion that Lord Lindley was right. The questions to be decided in the present case were pure questions of fact, namely, whether the intention of the defendant, when he entered for the races, was to obtain the prizes, and whether he made the representations with that intention. It appears from the case that he pretended to be a man who had never won a foot-race, and he was handicapped on the faith of that statement, as is shewn by the evidence given by the handicapper; but it also appears from the case that his statement was false, for he had won races. Then it was suggested that he competed in the name of Sims, as it is put in the case, "for a lark"; but that question was for the jury, and they have negatived the suggestion. It was also contended that his coming in first in the races was owing to his own good running; but it was also owing, in part at least, to the false pretences, for by means of the false pretences he obtained a longer start than he would have had if his true name and performances had been known. It is also said that some other act had to be done in order to make the offence complete, and that he could not rightly be convicted because it was not shewn that he had applied for the prizes, and that the criminal intention was exhausted. The argument is exceedingly subtle, but unsound. In fact, he was found out before he had the opportunity of applying for the prizes, as no doubt he otherwise would have done. The pretences which the prisoner made were not too remote, and the conviction was good.

LAWRANCE J. concurred.

WRIGHT J. I am of the same opinion. If nothing more had been shewn than that the defendant had entered for the

(1) See note (1), ante, p. 599.

races in a false name, the case would have been different. If he did not run or claim the prize it would be difficult to say that there was an actual attempt to obtain it. But here in effect he did claim the prize.

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REG. v. BUTTON.

KENNEDY and DARLING JJ. concurred.

Conviction affirmed.

Solicitors for defendant: *Tolhurst, Lovell & Clinch, Gravesend.*
Solicitor for prosecution: *A. L. Rayner.*

P. B. H.

[CROWN CASES RESERVED.]

1900
July 28.

THE QUEEN *v.* STREETER.

Criminal Law—Receiving—Property Stolen by Wife from Husband—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 91—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.

Two prisoners, a man and a woman, were indicted for stealing property in a dwelling-house, and, in a second count, for receiving the same property. The woman was the prosecutor's wife, and the man had lodged in their house. After he left, the woman packed up the property in question, and sent it to the man, and afterwards left the house, and joined him, and the two lived together. The property was found in their possession. The jury found the woman guilty of stealing, and the man of receiving. The question was reserved, whether the man could be indicted for receiving the property:—

Held, that, as the stealing by a wife of her husband's property did not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but was made a criminal offence by the Married Women's Property Act, 1882, ss. 12, 16, the man was not liable to be convicted under the Larceny Act, 1861, s. 91, of receiving property stolen by the woman from her husband, and the conviction was wrong.

Reg. v. *Smith*, (1870) L. R. 1 C. C. 266, approved and followed.

CASE stated by the chairman of the West Sussex Quarter Sessions.

Ellen Tickner and William Streeter were tried for larceny in a dwelling-house of some household goods, a sewing-machine,

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and 27*l.* in money. A count for receiving, in the usual form, was added to the indictment.

It appeared from the evidence that the defendant Ellen Tickner was living with her husband James Tickner, to whom she had been married twenty-six or twenty-seven years, at Stammerham, near Horsham. The defendant William Streeter was lodging with them.

On April 21, 1900, James Tickner turned Streeter out of the house. On May 11 Ellen Tickner packed, and sent by the carrier to Horsham, two boxes labelled "Streeter, passenger to Brighton," which the carrier handed to Streeter at Horsham Station. Ellen Tickner shortly afterwards left her husband's house while he was at work, and joined Streeter at Southwater Station, on the line to Brighton. They were subsequently found living together as man and wife at Farnham. James Tickner, after his wife's disappearance, missed the money and goods referred to in the indictment, and gave information to the police, which led to the arrest of the prisoners. At the time of the arrest the missing goods were found in the boxes which Ellen Tickner had sent to Streeter, and 27*l.* in money was found in Streeter's box, the key of which was found in Ellen Tickner's purse.

There was no evidence of any of the goods being missed before Ellen Tickner's departure.

At the close of the case for the prosecution, counsel for Streeter submitted that, as regarded him, there was no case, inasmuch as, on the first count, there was no evidence against him; and upon the second count, even if it were proved that Ellen Tickner had committed a felony against her husband, under the provisions of s. 12 and s. 16 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), by taking away his goods, yet Streeter could not be indicted for receiving the goods knowing them to be stolen, as that statute had not made such receiving a felony, and that under s. 91 of the Larceny Act, 1861, only persons who received goods the stealing of which amounted to a felony, either at common law or under the provisions of that Act, could be indicted as receivers, and that, as the stealing by a wife of goods belonging to her husband was

not a larceny at common law or under the Larceny Act, no receiver of such goods could be indicted for a felony, and the attention of the chairman was called to the case of *Reg.* v. *Smith.* (1)

The chairman left the case to the jury, but reserved the point.

After hearing evidence on behalf of the prisoners, the jury found the prisoner Ellen Tickner guilty upon the first count, and the prisoner William Streeter not guilty on the first count, and guilty on the second count.

The question for the decision of the Court was, whether, upon the facts set out above, Streeter could be indicted for receiving goods stolen by Ellen Tickner from her husband.

Raven, for the prisoner Streeter. The conviction is bad, for the prisoner Streeter was indicted under the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 91, and, by the express terms of that section, in order to justify a conviction for receiving, the stealing of the property must amount to a felony, either at common law or by virtue of that Act. Here the property was stolen by Ellen Tickner from her husband, and that stealing is not a felony, either at common law or by virtue of the Larceny Act: *Reg.* v. *Kenny.* (2) Stealing by a wife from her husband is made a criminal offence by another and a later statute, the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12, 16. (3) In *Reg.* v. *Smith* (1), where the same question arose with regard to property belonging to a partnership, and stolen by one of the partners, which was made criminal by the Larceny Act, 1868 (31 & 32 Vict. c. 116), this Court held that the prisoner could not be convicted, under the Larceny Act, 1861, s. 91, of receiving the property. That decision is in point here, and is conclusive.

[He was stopped.]

Graham Campbell, for the prosecution. *Reg.* v. *Smith* (1) turned on a different statute, and therefore is not directly in point in the present case, and, moreover, it is a decision which

(1) L. R. 1 C. C. 266.
(2) (1877) 2 Q. B. D. 307.
(3) Amended as to evidence by 47 & 48 Vict. c. 14.

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has been the subject of much criticism, and the principle of which ought not to be extended: see especially the note on *Reg.* v. *Smith* (1) in Stephen's Digest of the Criminal Law, art. 383, 5th ed. p. 320, note 3, where the learned author speaks of it as "an instructive, but I think a most unfortunate, decision." [He also referred to *Reg.* v. *Caspar.* (2)]

MATHEW J. The conviction in this case must be quashed. The point is really concluded by the decision in *Reg.* v. *Smith.* (1) Formerly there were two cases in which an indictment for larceny could not be preferred. The first case was that of a wife taking the goods of her husband, and the second was that of a partner taking the goods of the partnership. Both these cases have been brought within the criminal law by Act of Parliament, the case of a partner by the Larceny Act, 1868 (31 & 32 Vict. c. 116), and that of a wife by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12, 16. The question which we have to determine is, whether the present case comes within the terms of the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 91, so as to render the male prisoner liable to be convicted of receiving. The material words of that section are as follows: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen . . . . shall be guilty of felony." Here the act of the woman in taking her husband's property, which would not have been a felony either at common law or by virtue of the Larceny Act, 1861, has been made a criminal offence by another Act, the Married Women's Property Act, 1882, ss. 12 and 16, but this does not bring it within the words, "either at common law or by virtue of this Act," that is, the Larceny Act, 1861. *Reg.* v. *Smith* (1) was a case in which partnership property had been stolen by a partner and received by the prisoner, the stealing being a criminal offence by virtue of the Larceny Act, 1868, and it was held that the prisoner

(1) L. R. 1 C. C. 266. (2) (1839) 2 Moo. C. C. 101; 9 C. & P. 289.

could not be convicted of receiving under the Larceny Act, 1861, s. 91. Our decision must be to the same effect, that is, that the prisoner cannot be convicted of receiving property stolen by a wife from her husband.

LAWRANCE J. concurred.

WRIGHT J. I agree that this prisoner could not properly be convicted under the Larceny Act, 1861, s. 91; but in future cases it seems that there might be an indictment for receiving at common law. (1)

KENNEDY and DARLING JJ. concurred.

Conviction quashed.

Solicitors for prisoner: *Biggs, Roche, Sawyer & Co., for Buckwell & Berkeley, Brighton.*

Solicitors for prosecution: *Preston, Stow & Preston, for Rawlison & Butler, Horsham.*

(1) See 2 Russell on Crimes, Book III., cap. xxviii. p. 418, 6th ed.

P. B. H.

C. A.
1900
July 30.

[IN THE COURT OF APPEAL.]

THE MANCHESTER SHIP CANAL COMPANY, LIMITED *v.* S. PEARSON & SON, LIMITED.

Arbitration—Submission to three Arbitrators—Refusal of Party to appoint Arbitrator—Jurisdiction of Court to stay Action—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

Where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and one of the parties refuses to appoint an arbitrator and brings an action against the other party to the submission, the Court has, under s. 4 of the Arbitration Act, 1889, power to stay the action.

APPEAL from an order of Bigham J.

The action was by shipowners against charterers, and was brought upon a charterparty which contained the following clause: "Should any dispute arise between the owners and the charterers, the matters in dispute shall be referred to three persons, one to be appointed by each of the parties hereto and the third by the two so chosen, their decision or that of any two of them shall be final, and for the purpose of enforcing any award this agreement may be made a rule of Court."

The plaintiffs took out a summons for an order that the case should be heard in the Commercial Court, and on the hearing of the summons the defendants asked that the action should be stayed, and the learned judge made an order accordingly.

The plaintiffs appealed.

Horridge, for the plaintiffs, relied upon *In re Smith and Service* (1) as shewing that the case of an agreement for three arbitrators was not within ss. 4, 5, and 6 of the Arbitration Act, 1889, and contended that the Court, having no power to order one of the parties to appoint an arbitrator or to appoint

(1) (1890) 25 Q. B. D. 545.

one in default of appointment by one of the parties, had no jurisdiction under the Act to stay the action.

Ellis Hill, for the defendants, was not called on.

A. L. SMITH L.J. I think the decision appealed from was right. We are told that a different practice prevails at chambers, which may possibly have arisen from the view taken of the decision in *In re Smith and Service*. (1) This case is one of shipowners bringing an action against charterers on a charter-party which contains a clause that disputes shall be referred to three arbitrators, one to be appointed by the shipowner and one by the charterers, and the arbitrators so appointed are to appoint the third. The defendants have done what would be equivalent to taking out a summons to stay the action on the ground of there being this arbitration clause, and they aver that they are ready and willing to appoint an arbitrator. Why should the action not be stayed? It is said that *In re Smith and Service* (1) shews that where three arbitrators are to be appointed the Court has no power to stay the action. That was also a case in which there were to be three arbitrators, and the shipowner obtained an order at chambers that the charterers should appoint an arbitrator. This order was affirmed in the Divisional Court; but it was decided in the Court of Appeal that there could not be found in the Arbitration Act any power in the Court or a judge, in the case of an agreement that there should be three arbitrators, to order one of the parties to appoint an arbitrator. The case did not come within the power given by the statute to the Court to appoint an arbitrator, because that is confined to the cases where the arbitrator is single or there are but two arbitrators. Lindley L.J. said very truly that this was a blot in the Act, and now we are asked to make what in my opinion would be another blot. This is not an application to order the appointment of an arbitrator, but to stay the action. The decision I have referred to does not govern this case, which comes within the very terms of s. 4, which are perfectly general. There was,

(1) 25 Q. B. D. 545.

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MANCHESTER SHIP CANAL COMPANY v. S. PEARSON & SON, LIMITED.

therefore, jurisdiction to make the order appealed from, and the appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I entirely agree. In the report of *In re Smith and Service* (1) the judgments, in which it is said that ss. 4, 5, and 6 did not apply, must be read by the light of the argument for the appellants. It is there said that s. 4 had no application to that case, because no legal proceedings had been taken. It is plain from this that when the learned Lords Justices said that s. 4 did not apply, it was not meant that this was because it was a case of reference to three arbitrators, but only because no legal proceedings had been commenced. On that ground no application could be made to stay the action; but in the present case it is abundantly plain that s. 4 does apply, the applicants for a stay having given their undertaking to name an arbitrator and do all things necessary to the proper conduct of the arbitration.

Appeal dismissed.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *Jaques & Co., for Samuel Wright & Co., Bradford.*

(1) 25 Q. B. D. 545.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1900
July 17.

COHEN *v.* TANNAR.

Landlord and Tenant—Covenant for Quiet Enjoyment—Interruption—Breach of Covenant against Assignment—Subsequent Assignment of Reversion—Re-entry by Assignees of Reversion—Consent Judgment.

The defendant was the lessee of a shop, the lease containing a covenant by him not to assign or underlet the premises. There was a condition for re-entry upon breach of any of the covenants in the lease. The defendant let the premises to the plaintiff for the remainder of the term, this lease containing a covenant by the defendant for quiet enjoyment of the premises by the plaintiff without any interruption by the defendant or any person lawfully claiming through him. Subsequently the original lessor assigned the reversion, and the assignees of the reversion brought an action against the defendant to recover possession of the premises as upon the breach of covenant against assignment. The defendant gave the plaintiff notice of the action, telling him that there was no defence, and signed a consent to judgment for possession, under which the plaintiff was evicted:—

Held, that, as the defendant had a good defence to the action, the breach of covenant having occurred before the assignment of the reversion, the act of the defendant in consenting to judgment for possession was the cause of the interruption of the plaintiff's enjoyment, and was therefore a breach of the covenant for quiet enjoyment.

APPEAL from the judgment of Ridley J. on further consideration after the trial of the action with a jury.

The action was brought to recover damages for breach by the defendant of a covenant for quiet enjoyment. By an agreement under seal, dated September 7, 1897, one Smith let to the defendant a shop for the term of three years from September 29, 1897, and the defendant covenanted not to assign, underlet, or part with the possession of the premises or any part thereof without the written approval of the landlord, such approval not being withheld in favour of a responsible and respectable tenant whose trade or business should be approved by the landlord. There was a condition for re-entry upon breach of any of the covenants. On November, 16, 1898, the defendant, without asking for or obtaining the licence or

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COHEN v. TANNAR.

approval of the landlord, by an agreement under seal let the shop to the plaintiff from November 16 until September 29, 1900, and the defendant thereby covenanted that the plaintiff, paying the rent thereby reserved and performing and observing the conditions of the agreement on his part therein contained, might peaceably hold and enjoy the premises during the tenancy "without any interruption by the" defendant "or any person lawfully claiming through him." The plaintiff entered into possession.

On November 25, 1898, Smith assigned his reversion to Levy & Franks, neither of the parties then knowing that the defendant had assigned the premises. On December 16, 1898, Levy & Franks served on the defendant notice of forfeiture by reason of the assignment to the plaintiff. On January 10, 1899, Levy & Franks brought an action to recover possession of the premises, against the defendant, to which he entered an appearance. On January 18 the defendant's solicitor wrote to the plaintiff informing him that an action of ejectment had been brought against the defendant by reason of breach of covenant, and asking for an interview. On the next day the plaintiff saw the defendant's solicitor, who told him that the defendant had no defence to the action, and that he would have to give up possession, at the same time offering him 10*l.* to go out. The plaintiff replied that he would consult his solicitor, who on January 21 wrote to the defendant's solicitor that if the plaintiff was ejected he would hold the defendant responsible in damages under his covenant for quiet enjoyment. On February 1, 1899, the defendant's solicitor, for and on behalf of the defendant, signed a consent to an order for judgment for possession of the premises, and on February 2, in pursuance of this consent, an order was made giving Levy & Franks leave to sign final judgment for possession. Judgment was accordingly signed, and the plaintiff was evicted. The plaintiff thereupon brought the present action.

The jury assessed the damages at 160*l.*, and Ridley J. on further consideration entered judgment for the plaintiff. The defendant appealed.

J. F. P. Rawlinson, Q.C., and *F. Shewell Cooper*, for the defendant. There has been no breach of the covenant for quiet enjoyment. The interruption of the plaintiff's possession was caused by the act of the superior landlord. There was, therefore, no interruption by the defendant or by any one claiming through him: *Stanley* v. *Hayes* (1); *Kelly* v. *Rogers*. (2) The act of the superior landlord was the act of a person claiming against the defendant, and not through him. It is immaterial to the present question whether the defendant had a good defence to the action of ejectment or not. Even if he had a good defence by reason of the breach of covenant having occurred before the assignment of the reversion, it cannot be said that the defendant's act of consenting to judgment was the cause of the interruption of the plaintiff's enjoyment. He was under no obligation to the plaintiff to defend the action. The mere omission to defend would not have been a breach of the covenant, and yet the result would have been the same if, instead of consenting to judgment, the defendant had merely omitted to defend. The proper course for the plaintiff to have pursued was, when he received notice of the action, to have appeared and defended under Order XII., r. 25.

[They also cited *Clayton* v. *Leech* (3); *Harrison* v. *Muncaster*. (4)]

Robert Wallace, Q.C. (*Harold S. Simmons* with him), for the plaintiff. As the assignment of the reversion to Levy & Franks took place after the lease to the plaintiff, Levy & Franks had no cause of action founded upon the alleged forfeiture for breach of covenant. The defendant, therefore, had a good defence to the action, and it was his act of consenting to judgment that gave the assignees of the reversion the right to re-enter and evict the plaintiff. The plaintiff knew nothing of the circumstances, and, therefore, could not apply for protection under s. 4 of the Conveyancing Act, 1892. The defendant told him that there was no defence to the action, and that he would have to quit possession. *Kelly* v. *Rogers* (2) is not in point, because in that case there was a mere omission to pay

(1) (1842) 3 Q. B. 105.
(2) [1892] 1 Q. B. 910.
(3) (1889) 41 Ch. D. 103.
(4) [1891] 2 Q. B. 680.

C. A. 1900

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the rent and do the repairs, whereas here the defendant did an act which gave the assignees of the reversion the right to re-enter.

Rawlinson, Q.C., replied.

A. L. SMITH L.J. This is an action upon a covenant for quiet enjoyment whereby the defendant covenanted with the plaintiff that the latter, paying the rent and performing and observing the conditions of the agreement, might peaceably hold and enjoy the premises during the tenancy without any interruption by the defendant or any person lawfully claiming through him. The question before us is whether Ridley J. was right in holding that there had been a breach of the above covenant for quiet enjoyment. The facts were that by an agreement under seal, dated September 7, 1897, a shop was let to the defendant for the term of three years from September 29, 1897, and in that agreement the defendant covenanted not to assign, underlet, or part with the possession of the premises or any part thereof without the written approval of the landlord. On November 16, 1898, by an agreement under seal, the defendant let the shop to the plaintiff, without the licence of the superior landlord, for the residue of the term. This the defendant had no right to do. On November 25, 1898, the superior landlord assigned his reversion to Levy & Franks. On December 16, 1898, Levy & Franks served on the defendant notice that it was their intention to re-enter upon the ground that he had broken the covenant not to assign, underlet, or part with the possession of the premises. Upon January 10, 1899, Levy & Franks brought an action against the defendant to recover possession of the premises. What happened after that was this. Levy & Franks had no right to bring the action, because there had been no breach of the covenant since the assignment to them upon which they could re-enter. At an interview between the plaintiff and the defendant's solicitor, before judgment was signed, the latter stated that the defendant had no defence to the action, and that the plaintiff would have to give up possession, offering him 10*l.* to go out. The defendant was mistaken in that view, as he had a perfect

answer to the action. The plaintiff's solicitor thereupon wrote to the defendant's solicitor that the plaintiff, if he was ejected, would hold the defendant responsible in damages under his covenant for quiet enjoyment. The defendant, nevertheless, consented to judgment for possession being signed against him, the result being that the plaintiff was evicted. The present action was then brought to recover damages for breach of the covenant for quiet enjoyment. Ridley J. held that there was an interruption of the plaintiff's enjoyment of the premises by the act of the defendant, namely, by his actively consenting to judgment for which he must have known, if he had considered the matter for a moment, that there was no foundation. In my opinion there was evidence upon which my brother Ridley could so find, and I think that the appeal must fail. It was contended that the decision in *Kelly* v. *Rogers* (1) covered the present case, the contention being that the act of the superior landlord in recovering possession under the condition of re-entry in the original lease was not the act of a person claiming through the defendant. But there is something more in the present case than the mere act of the superior landlord. There is the act of the defendant in consenting to judgment for possession, which was the cause of the plaintiff being turned out. In my opinion, therefore, the learned judge was right in holding that that act of the defendant was a breach of the covenant for quiet enjoyment. The appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I agree. I will deal first of all with the case as if the interruption of the plaintiff's enjoyment was solely due to the act of the superior landlord in bringing an action to recover possession of the premises for breach of the covenant against assigning or underletting. On that supposition *Kelly* v. *Rogers* (1) is a clear authority to shew that the re-entry by the superior landlord would not come within the purview of the covenant for quiet enjoyment, inasmuch as the interruption would not be by the defendant or by any person claiming through him.

(1) [1892] 1 Q. B. 910.

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It is said, however, that the re-entry by the assignees of the superior landlord was not the cause of the interruption of the plaintiff's quiet enjoyment; that the assignees had no right of re-entry at all, because the breach of the covenant upon which they professed to re-enter occurred before the assignment to them; and that the right of re-entry was conferred upon the assignees by the defendant's consent to judgment. It is, therefore, contended that it is not a case of a mere omission to defend the action, but there was an act of commission by the defendant in consenting to judgment for possession in an action in which no judgment could have been obtained against him by the assignees of the reversion. In my opinion that contention is correct. In one sense I am sorry to have to decide the case upon this ground, because I feel that, if all the defendant had done had been to omit to defend the action, there would have been no breach of the covenant for quiet enjoyment. The reason I say so is this: there may, no doubt, be a breach of the covenant by an act of omission, but it must be the omission of some duty, and there was no duty cast upon the defendant of defending the action after he had given notice to the plaintiff of the pendency of the action, when the plaintiff might perhaps, if he had so chosen, have applied for an order under s. 4 of the Conveyancing Act, 1892. However thin this distinction may be, logically there is all the difference in the world. In this case it is clear that the immediate cause of the interruption of the plaintiff's enjoyment of the premises was the positive act of the defendant in consenting to judgment, without which the assignees of the reversion could not have obtained judgment. For these reasons I think that the judgment should be affirmed.

ROMER L.J. I am of the same opinion. I do not think that we can speculate as to what might have happened if the defendant had not consented to judgment for possession. Nor can we speculate as to what might have happened if the defendant had defended the action. We can only look at the exact facts which led to the judgment being signed by the assignees of the reversion against the defendant. Those

facts are that the defendant's landlords, the assignees of the reversion, brought an action against him for possession, in which they were not entitled to succeed—in which indeed they were bound to fail. The defendant must be taken to have known that, because he must have known the circumstances in which the action was brought. In those circumstances he consented to an order that judgment should be signed against him in that action for possession. He consented to judgment when the assignees of the reversion were not entitled to succeed. It was under that order that the plaintiff was turned out of possession. Therefore, by an order which acquired its validity solely from the voluntary act of the defendant, the plaintiff lost the possession; and that amounts to an interruption by the defendant of his quiet enjoyment of the premises. Upon that ground the plaintiff is entitled to succeed in this action.

Appeal dismissed.

Solicitors for plaintiff: *Nordon & De Frece.*
Solicitors for defendant: *Swann, Green & Co.*

E. L.

C. A.
1900
July 20.

[IN THE COURT OF APPEAL.]

BOSTOCK *v.* RAMSEY URBAN DISTRICT COUNCIL.

Practice—Costs—Action against Public Authority—Discretion to Deprive Successful Defendants of Costs—Order LXV., *r.* 1—"*Good Cause*"—*Public Authorities Protection Act*, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1 (*b*).

The Public Authorities Protection Act, 1893, s. 1 (*b*), which provides that, wherever in an action within the Act a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client, does not take away the discretion given to the judge at the trial by Order LXV., r. 1, to deprive the successful defendant of costs for good cause:—

So *held*, affirming the judgment of Lord Russell of Killowen C.J.

What constitutes "good cause" within Order LXV., r. 1, discussed.

APPEAL from an order of Lord Russell of Killowen C.J., depriving the defendants in an action for malicious prosecution of costs under the circumstances after mentioned. (1)

The plaintiff was the part proprietor of a travelling menagerie. On December 15, 1897, this menagerie came to the town of Ramsey, in Huntingdonshire, for the purpose of exhibiting for one day. The manager employed by the proprietors of the menagerie placed the vans of which it consisted, being between twenty and thirty in number, upon a certain open space in the town called the Great Whyte, which was a public highway. It appeared that the menagerie had on previous occasions been placed in the same spot. The manager was informed by the surveyor of highways that he could not be permitted to have his vans standing in the street; but no measures were taken to have the obstruction removed by the police, and the vans remained there for the space of fifteen hours, after which the menagerie left the town. The plaintiff had no knowledge of what was done, he being a resident in Glasgow. On December 15, 1897, the solicitors for the defendants addressed a letter to the plaintiff, giving him formal notice that the Ramsey Urban District Council had resolved that no travelling

(1) [1900] 1 Q. B. 357.

menagerie, circus, or other show should be allowed to place its caravans in the streets of the town, and that, if he persisted in so doing, the council would without further notice forthwith commence an action against him for damages, and apply to the Court for an injunction against a repetition. The defendants were subsequently advised by counsel that they had a remedy against the plaintiff by indictment; and in May, 1898, they preferred an indictment against the plaintiff at Huntingdon Assizes for having unlawfully obstructed the highway. A true bill having been found by the grand jury, a correspondence took place between the defendants' solicitors and the plaintiff, in which the former stated that according to the ordinary course in such cases a warrant for the plaintiff's apprehension would have to be applied for, unless he would appear voluntarily before a justice, and be bound over to take his trial at the next Huntingdon Assizes, and the plaintiff stated in answer that he had personally no knowledge of the transaction, and apologised for the action of his manager in obstructing the highway. Ultimately the plaintiff appeared before a magistrate, and was bound over to appear at the assizes. When the trial of the indictment came on, Wills J., who tried the case, directed the jury to acquit the plaintiff. The plaintiff subsequently brought his action against the defendants for malicious prosecution. The Lord Chief Justice, who tried the action, ruled that there was reasonable and probable cause for the prosecution, and that there was no evidence of malice, and directed judgment to be entered for the defendants without costs, reserving for further consideration the question whether, having regard to the provisions of the Public Authorities Protection Act, 1893, he had power for good cause to deprive the defendants of costs under Order LXV., r. 1. On further consideration he held that he had that power, and that under the circumstances of the case there was good cause for depriving the defendants of costs.

Lawson Walton, Q.C., and *J. W. Cooper*, for the defendants. If there are no facts which can constitute "good cause" within the meaning of Order LXV., r. 1, that is matter of

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appeal: *Jones* v. *Curling* (1); *Huxley* v. *West London Extension Ry. Co.* (2) There were no such facts in this case. The defendants acted in pursuance of counsel's opinion, and the Lord Chief Justice found that there was no evidence against them of malice or of absence of reasonable and probable cause. The mere fact that the defendants took criminal proceedings unsuccessfully cannot be good cause for depriving them of costs. It is not contended that "good cause" under Order LXV., r. 1, is confined to misconduct by the successful party in the course of the action. If the conduct of the defendants had been such as to mislead the plaintiff, and induce him reasonably to believe that he had a good cause of action, that conduct might amount to good cause: *Harnett* v. *Vise.* (3) In this case the essential elements of the cause of action were malice and absence of reasonable and probable cause. The conduct of the defendants was not such as to entitle the plaintiff to suppose that either of those elements existed. Assuming, however, that the conduct of the defendants might possibly have afforded some ground to the plaintiff for believing that there was malice, what conduct of the defendants was there which entitled the plaintiff to believe that there was absence of reasonable and probable cause? It cannot be said that the bringing by the plaintiff of a baseless action for malicious prosecution was a consequence of the defendants' conduct in any other sense than would apply in every case where there has been an unsuccessful criminal proceeding. It cannot be that in every case where criminal proceedings have failed there is a discretion to deprive the successful defendants in a subsequent action for malicious prosecution of costs.

Secondly, the Public Authorities Protection Act, 1893, s. 1 (*b*), gives to the defendants an absolute statutory right to costs as between solicitor and client, and, that being so, the Lord Chief Justice had no discretion to deprive the defendants of costs under Order LXV., r. 1: *Hasker* v. *Wood* (4); *Reeve* v. *Gibson* (5); *Cree* v. *St. Pancras Vestry.* (6) The intention of

(1) (1884) 13 Q. B. D. 262.
(2) (1889) 14 App. Cas. 26.
(3) (1880) 5 Ex. D. 307.
(4) (1885) 54 L. J. (Q.B.) 419.
(5) [1891] 1 Q. B. 652.
(6) [1899] 1 Q. B. 693.

the Act appears to be that a public authority shall have an absolute right to a complete indemnity, if they have acted within their legal right. If the object were merely to provide that, where a public authority is entitled to costs, they shall be taxed as between solicitor and client, the language is not appropriate. The sub-section says that a judgment for the defendants is to carry costs as between solicitor and client. The Public Authorities Protection Act, 1893, was passed for the purpose of establishing a uniform provision for the protection of all public authorities in the place of the multifarious enactments relating to different bodies which are mentioned in the schedule and repealed by the Act. Many of those Acts gave the public authorities to which they respectively related an absolute right to particular kinds of costs, such as double costs, full costs of suit, and such like. It is submitted that it could not have been intended by the Public Authorities Protection Act, 1893, to deprive such authorities of the absolute right to costs which they before had.

[They also cited on this point, *North Metropolitan Tramways Co.* v. *London County Council* (1); *Harrop* v. *Ossett Corporation* (2); *Fielden* v. *Morley Corporation.* (3)]

Blake Odgers, Q.C., and *P. Rose-Innes*, for the plaintiff. The true construction of the Public Authorities Protection Act, 1893, s. 1 (*b*), is that it means that a judgment upon which the defendant would, apart from that Act, be entitled to costs, shall carry costs on the scale applicable as between solicitor and client, and not that the discretion of the judge under Order LXV., r. 1, shall be taken away. It would not be reasonable that the defendant in a case within the Act should be entitled to costs as between solicitor and client, no matter how vexatious, oppressive, or unreasonable his conduct in relation to the litigation had been, or how much his conduct might have misled the plaintiff and brought the action on himself.

[They cited on this point *Holford* v. *Acton Urban Council* (4); *Avery* v. *Wood.* (5)]

(1) [1898] 2 Ch. 145.
(2) [1898] 1 Ch. 525.
(3) [1900] A. C. 133.
(4) [1898] 2 Ch. 240.
(5) [1891] 3 Ch. 115.

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With regard to the question whether there were any facts which could constitute "good cause" for depriving the defendants of costs, it is clear that, if there were any such facts, this Court cannot review the exercise by the Lord Chief Justice of his discretion. It is clear also that the conduct of the defendants which may amount to "good cause" is not confined to conduct in the course of the action. The Lord Chief Justice was entitled to take into consideration the circumstances which led up to the action; and, if there were facts which pointed to the conclusion that the defendants had by their conduct brought the action upon themselves, as in *Harnett* v. *Vise* (1), he had a discretion under Order LXV., r. 1, to deprive the defendants of costs. It is submitted that there were such facts.

A. L. SMITH L.J. This is an appeal against an order of the Lord Chief Justice depriving the defendants of costs. The circumstances of the case are of a somewhat unusual character. The plaintiff in the action was the part proprietor of a travelling menagerie, which had on previous occasions been at Ramsey, and occupied the spot in question. On the occasion of the alleged obstruction of the highway this menagerie was brought to the place for the purpose of staying there one night and moving on the next day. The plaintiff's servant, who was in charge of it, thought he was entitled to place his vans on the spot in question, and accordingly did so. Some objection was taken by the defendants' representative, but no steps were taken to compel the removal of the vans. The show was held on that one evening, and the next day the menagerie went on its way. Some months after a bill of indictment for obstructing the highway was preferred against the plaintiff by the defendants. Pausing there for a moment, I should say that there could not be a more puerile proceeding than the preferring of this indictment under the circumstances. The plaintiff was resident in Glasgow. The defendants threatened to get a warrant to bring him to England. He wrote apologising for what his manager had done, but the upshot of it was that, the

(1) 5 Ex. D. 307.

bill of indictment having been preferred, a true bill was found, and the case came on for trial before Wills J. at the Huntingdon Assizes. The case had not proceeded far, when that learned judge made some strong comments upon it, and the end of it was that he held there was no case, and the plaintiff was acquitted. It is said now that the learned judge was wrong in holding that the plaintiff was not liable for the act of his servant, of which he knew nothing personally, and that there was a case against the plaintiff. I will not stay to inquire whether that was so or not. I do not think that, if the judge had not ruled as he did, any jury would on such facts have found that the plaintiff was guilty of obstructing the highway. The plaintiff, having been acquitted, brought this action against the defendants for malicious prosecution. The action was tried by the Lord Chief Justice, who came to the conclusion that there was no evidence of any malice on the part of the defendants, or of absence of reasonable and probable cause for the prosecution; and he therefore directed a verdict for the defendants. Now arises the controversy in this case. The Lord Chief Justice appears to have taken the same view of this prosecution instituted by the defendants as I have already expressed, and, although he directed a verdict for them, he deprived them of costs under Order LXV., r. 1. He seems to have thought that the conduct of the defendants in instituting this criminal proceeding by indictment under the circumstances was such that the plaintiff might thereby be reasonably induced to think that they were actuated by malice and acted without reasonable cause, or, in other words, that their unreasonable conduct had really been the origin of the action.

Two questions arise. The first is whether there was any evidence of "good cause" within the meaning of Order LXV., r. 1. It has been held, and cannot be disputed, that, if there be such evidence, then the matter is one for the discretion of the judge, and this Court cannot review the exercise of his discretion. That was laid down clearly in the cases of *Jones* v. *Curling* (1) and *Huxley* v. *West London Extension Ry. Co.* (2) The question, therefore, really comes to be whether there was

(1) 13 Q. B. D. 262. (2) 14 App. Cas. 26.

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any evidence for the Lord Chief Justice that the conduct of the defendants in instituting this prosecution under the circumstances which I have mentioned was such as might give rise to a reasonable belief in the plaintiff's mind that he was entitled to succeed in an action for malicious prosecution, if he brought one. It is clear of course that, if the conduct relied on as constituting "good cause" had relation to a subject-matter wholly unconnected with the action, it could not be evidence of "good cause." It seems to me that the Lord Chief Justice was right when on general principles he came to the conclusion that "the judge is not confined to the consideration of the defendants' conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation." I say on general principles, because his attention does not appear to have been called to the case of *Harnett* v. *Vise* (1), in which it was distinctly held by the Court of Appeal that the judge is not confined, in considering the question whether there is good cause for depriving the successful party of costs, to the conduct of the parties in the litigation itself, but must consider the whole circumstances of the case and everything which led to the action. I think that in this case there was evidence of conduct on the part of the defendants such as to lead the plaintiff reasonably to think that he had a good cause of action against them, and which the judge was entitled to take into consideration as constituting good cause for depriving the defendants of costs. Therefore, it appears to me that on the first ground the appeal fails.

With regard to the second point, I consider the construction of the Public Authorities Protection Act, 1893, s. 1 (*b*), clear. I do not think it necessary to consider the various Acts which were repealed by that Act. It is sufficient to consider the terms of the Act itself. It provides that, "where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged

(1) 5 Ex. D. 307.

neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect. . . . . (*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client." In my opinion the meaning is that the judgment is to carry costs as between solicitor and client, where the defendant is entitled to costs. The result of the opposite view is that, however vexatious and unreasonable the conduct of the defendant may have been, yet he is to have costs as between solicitor and client. I do not think that would be a reasonable reading of the section. In my opinion the meaning is merely that, where the defendant is entitled to costs, he is to have them on the scale on which costs are taxed as between solicitor and client. The only divergent opinion on the point appears to be that of Bruce J. in *Cree* v. *St. Pancras Vestry*. (1) I have the greatest respect for his opinion, but I cannot agree with the view which he there took. On the other hand there is the opinion expressed by my brother Romer in the case of *North Metropolitan Tramways Co.* v. *London County Council* (2), and that of the Lord Chief Justice in the present case. With regard to the case of *Hasker* v. *Wood* (3), I can only say that when once one has arrived at the conclusion which I have stated with regard to the construction of the Public Authorities Protection Act, 1893, that case does not apply. For these reasons I think the appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I agree. The arguments have made the points at issue very clear. The question which arises is as to the application of the provision of Order LXV., r. 1, that the judge may in a case tried by a jury for good cause order that the costs shall not follow the event. Two points only are raised. First, it is said that the rule has no application at all, because in this case costs are given to the defendants by statute, and their statutory right to costs cannot be affected by the judgment of the judge who tries the case. It is not of course contested that, if an Act of Parliament provides that in

(1) [1899] 1 Q. B. 693. (2) [1898] 2 Ch. 145.
(3) 54 L. J. (Q.B.) 419.

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Vaughan Williams L.J.

a given event a litigant shall be entitled to costs, then the judge would have no jurisdiction to interfere in relation to those costs; but it is said on behalf of the plaintiff that the Public Authorities Protection Act, 1893, s. 1 (*b*), does not contain any such provision. I do not think that it does. I think that, reading s. 1 (*b*) according to a reasonable construction of its terms, it does not mean that the public authority shall in the case there mentioned be entitled to costs as between solicitor and client to the exclusion of any discretion of the judge under Order LXV., r. 1. I am led to this conclusion in the first place by the considerations referred to by the Lord Chief Justice in connection with the case of *Southampton and Itchin Bridge Co.* v. *Local Board of Southampton* (1), which I will not repeat. But, apart from those considerations, I think that the words of s. 1 (*b*), when carefully considered in connection with the provisions of the Act as a whole, do not import any intention to give the defendants costs in any such sense as to take away the discretion of the judge under Order LXV., r. 1. I think that, when the Legislature said in s. 1 (*b*) that, "wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client," they only meant to fix the measure of costs in a case where the judgment is of such a character that by it the defendant is to get costs. I do not think they meant that the judgment for the defendant must carry costs. If one looks at the later provisions of the section, they seem to me to tend to shew that this is so. By s. 1 (*c*), where in an action for damages within the Act there has been a tender or payment into court, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant "shall be entitled to costs to be taxed as between solicitor and client as from the time of the tender or payment." The case contemplated by this subsection appears to be one in which the plaintiff has vexatiously carried on litigation against the public authority after sufficient amends were offered, and consequently it is provided that in that case the defendant "shall be entitled" to costs as between

(1) (1858) 8 E. & B. 803, n.

solicitor and client after the tender or payment into court. I think that the expression "shall carry costs as between solicitor and client" in s. 1 (*b*) cannot have been intended to have the same meaning as the expression "the defendant shall be entitled to costs as between solicitor and client" in s. 1 (*c*). So much for the first point.

The second point is whether, assuming that the Lord Chief Justice had a discretion for good cause to deprive the defendants of costs, there were in this case any facts on which he was entitled to hold that the defendants had so conduced to the litigation that they ought not to have their costs. It is not disputed by the plaintiff's counsel that there must be some facts forming a basis for the exercise of the discretion; that there must have been some conduct on the part of the defendants, either in the course of the litigation, or conducing to it, which might amount to a cause for depriving the defendants of costs. Both sides accept the law as laid down in *Harnett* v. *Vise* (1); and, therefore, really the only question in this case comes to be whether there was conduct on the part of the defendants which can be considered as having led to the action being brought, and but for which it probably never would have been brought. I think that there were facts in this case which the Lord Chief Justice was entitled to treat as constituting good cause for depriving the defendants of costs. If that be so, we have no jurisdiction to review his discretion in the matter. The plaintiff, before bringing his action against the defendants, would have to consider whether there were grounds which made it right and proper for him to do so. No one can deny that it is theoretically possible that the defendants might so act as to lead the plaintiff reasonably to suppose that they were actuated by malice in prosecuting him, and that they did so without reasonable and probable cause. It seems to me that in the circumstances of the present case there is ground for supposing that the conduct of the defendants did lead the plaintiff to think that he had a good cause of action against them, both in respect of the existence of malice and the absence of reasonable and probable cause. With regard to the

(1) 5 Ex. D. 307.

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question of malice, the matter has not been very strongly contested; and, with regard to reasonable and probable cause, it appears that the defendants themselves at the outset of the affair took the view that their proper remedy was in a civil court, and expressed that view to the plaintiff. The reason they changed their mind on that subject appears to have been that counsel advised them that they had a remedy by indictment, and that it might be a cheaper one. They did not communicate their change of view or the reasons for it to the plaintiff, but still left him to suppose that they knew that their proper remedy was a civil one; and the result of the trial before Wills J. would be to confirm the impression in his mind that they had conducted themselves unreasonably in preferring the indictment. It seems to me under the circumstances impossible to say that there were not some facts on which the Lord Chief Justice might come to the conclusion that the defendants had by their conduct conduced to the plaintiff's bringing the action, and induced in his mind the belief that they had acted maliciously and without reasonable and probable cause. Under those circumstances the Lord Chief Justice had a discretion to deprive the defendants of costs, and we have no jurisdiction to review his exercise of that discretion.

ROMER L.J. With regard to the construction of the Public Authorities Protection Act, 1893, I adhere to what I said in *North Metropolitan Tramways Co.* v. *London County Council.* (1) In my opinion that Act was not intended to take away from the judge the power to deprive a successful defendant of costs in an action of the class contemplated by the Act in a case in which it would otherwise be proper to do so. In my view, if the action fails, but the defendant is deprived of costs by the judge, the defendant cannot be said to have obtained a judgment within the meaning of s. 1 (*b*) of the Public Authorities Protection Act, 1893. Of course, if in an action of this kind, since the Act of 1893, judgment is given simply for the defendant, it must be taken to be a judgment for the defendant within the meaning of the Act, and therefore would carry

(1) [1898] 2 Ch. 145.

costs as between solicitor and client. But, if the Act is not intended to take away the discretion of the judge to deprive the defendant of costs, the judge, on exercising that discretion, ought to see that the judgment is so drawn up as to carry out his intention. It cannot, however, matter, in my view, in what particular form the judgment is drawn up, so long as the intention is clear. The word "judgment" is, in my opinion, not used in the Act with any reference to the precise form in which the judgment or order of the Court may be drawn up. It is used as indicating the substance of the judgment, as was pointed out in *Shaw* v. *Hertfordshire County Council* (1), where it was held that a consent order made in chambers dismissing the action with costs was a judgment for the defendants within the meaning of the Act. I confess I think the point with reference to the construction of the Act reasonably clear.

With regard to the second point, namely, whether there were any facts which the Lord Chief Justice was entitled to treat as good cause for depriving the defendants of costs, it is clear that the "good cause" referred to by Order LXV., r. 1, is not confined to cause founded upon the conduct of the successful party in the course of the litigation. It might, for example, in the case of a successful defendant, be founded on conduct of the defendant outside the action, if the conduct were such as to have led the plaintiff reasonably to suppose that he had a good cause of action, and thus induced him to bring the action. I limit the proposition so as to shew clearly that I do not consider that such conduct on the part of the defendant would constitute good cause within Order LXV., r. 1, if it had no reference to the action, and did not induce the plaintiff reasonably to believe that he had a right of action. Misconduct in nowise connected with the action could not be any ground for depriving a successful defendant of costs. Nor, I think, could conduct of the defendant outside the action constitute "good cause," if it were not such as to induce the plaintiff reasonably to suppose that he had a good cause of action, and so conduce to the action. Applying that view to such a case as the present: Suppose X. takes criminal

(1) [1899] 2 Q. B. 282.

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Romer L.J.

proceedings against Y., which fail, but X. had reasonable and probable cause for taking those proceedings, and was not actuated by malice: then suppose that Y. brings an action for malicious prosecution against X., and the action fails. I should say that the mere fact that X. had taken criminal proceedings against Y. unsuccessfully would not be good cause for depriving X. of costs. If it were so, in all cases of an action for malicious prosecution the defendant could be deprived of costs. But if X. by his conduct in the proceedings or otherwise had induced a reasonable belief in the mind of Y. that X. had acted with malice and without reasonable and probable cause, then I think there would be good cause for depriving X. of costs. I think that, looking fairly at the judgment of the Lord Chief Justice in this case, it appears that he intended to deprive the defendants of costs on this latter ground. I have felt some doubt on the facts whether there was sufficient to justify the finding that the conduct of the defendants was such as to induce and did induce such a belief in the plaintiff's mind as I have mentioned; but, my brothers being clearly of opinion that there was evidence to support such a finding, I do not think that I should be justified in differing on that question, being one of fact, from the view taken by my brothers and the Lord Chief Justice. That being so, it follows that the Lord Chief Justice had a discretion in the matter, and with the exercise of that discretion we have no jurisdiction to interfere.

Appeal dismissed.

Solicitors for plaintiff: *Lewis & Newton.*

Solicitors for defendants: *Stevens, Son & Parkes, for Serjeant & Son, Ramsey.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1900
June 30.

CROSSFIELD & SONS, LIMITED *v.* TANIAN.

Employer and Workman—Compensation—Review of Weekly Payment—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I, clause* 12.

An application under Sched. I., clause 12, of the Workmen's Compensation Act, 1897, for the review of a weekly payment cannot be entertained, where there has been no change in the circumstances of the case since the weekly payment was awarded.

Per A. L. Smith and Romer L.JJ., Vaughan Williams L.J. doubting.

APPEAL from a decision of a judge of the Warrington County Court upon an application under the Workmen's Compensation Act, 1897, for the review of a weekly payment.

The respondent, a labourer in the service of the appellants, had filed a request for arbitration as to the amount of compensation to be awarded him for the loss of his right eye through an accident arising out of and in the course of his employment; in the particulars attached to the request it was stated that his weekly earnings before the accident had averaged 30*s.* a week, and that he was earning 17*s.* 1*d.* a week at the time of the application. The appellants omitted to file an answer within the time limited by the rules, but delivered an answer which was out of time and in which it was alleged that the respondent's average weekly earnings before the accident were only 19*s.* 10½*d.* The county court judge, at the hearing in August, 1899, held that as no proper answer had been filed the appellants were precluded from giving evidence as to the amount of the respondent's weekly earnings, and that he must take his weekly earnings at the sum alleged by the respondent himself, there being no contradiction of such allegation in an answer of which the appellants could avail themselves; in the result he made an award in the respondent's favour of 12*s.* 6*d.* a week, which sum was paid for several months by the appellants. In March, 1900, the appellants made this application

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to the county court judge, under Sched. I., clause 12, of the Act (1), for a review of the amount of the weekly payment; it being admitted, however, that no change had taken place in the circumstances since the original hearing, the county court judge refused to review the weekly payment. The employers appealed.

Arthur Powell, for the appellants. Admitting that the award is final as to the liability of the appellants, they were nevertheless entitled to go to the county court judge and shew that there had been a mistake which resulted in the award being based upon a wrong sum as the average weekly earnings of the respondent. Except as to liability, there is no finality about the award, and either party may at any time apply under Sched. I, clause 12, for a review of the weekly payment.

W. Denman Benson, for the respondent, was not called upon to argue.

A. L. SMITH L.J. The short question which we have to decide is whether, under Sched. I, clause 12 of the Act, an employer can apply for a review of a weekly payment when the state of circumstances existing at the date of the award has been in no way altered at the time that the application is made for a review. Here there had been an award by the county court judge based upon the statement of the man that his average wages were 30*s.* a week before the accident; the employers had endeavoured to shew that they were only 19*s.* 10½*d.*; but in this they were out of order, for they had not put in an answer within the time required by the rules, and the county court judge held that it was not open to them to take that point. It is perfectly clear that in acting as he did the county court judge made no mistake, and no appeal was brought against his decision. For a time there was an end of

(1) By Sched. I., clause 12, of the Workmen's Compensation Act, 1897, "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

the matter, but, after paying the amount awarded for some seven months, the employers made this application for a review of the weekly payment, and the question arose as to what, if any, change had taken place in the circumstances of the case since the making of the award. The answer to that question was that no change whatever had taken place, and that the circumstances were precisely the same as those which existed at the date of the award: there is an admission to that effect upon the judge's notes. The real point which the employers were endeavouring to raise by means of this application was that the award was wrong, because the award ought to have been based on the sum of 19*s.* 10½*d.*, and not upon 30*s.*, as the man's average weekly earnings. But is it competent to the employers upon such an application to shew that the award is wrong? In my opinion it is not. Clause 12 means that in cases where a weekly payment has been ordered, and the injured workman gets better in health and earns better wages, the employer may apply for a review; on the other hand, the man might get worse and might be able to earn less wages, and he might in such a case take proceedings for a review. It is "any weekly payment," not "any award," which may be ended, diminished or increased, upon such an application by either employer or workman, subject, as the clause itself says, to the maximum before provided in the schedule. I think, therefore, that the decision of the learned county court judge was right, and that this appeal should be dismissed.

VAUGHAN WILLIAMS L.J. I agree that it would be manifestly unfortunate if Sched. I, clause 12, could be used for the purpose of appealing against an award that one side or the other did not like, and I feel sure that the Legislature did not intend that this power should be used for any such purpose; in the present case I think that an attempt has been made so to use it. But, though I have come to that conclusion upon the facts of this case, I know of no duty of the Court, which is more difficult to exercise, or which ought to be more sparingly exercised, than what I may call the power of interlinear legislation—that is to say, of introducing into an Act of Parliament

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words which are not there. What are the words of clause 12? "Any weekly payment"—the Act does not say "awarded," but without introducing words we can say that it obviously means "awarded," for that is the only kind of weekly payment dealt with by the Act—"may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act." It has been suggested that in the exercise of its powers of interlinear legislation the Court should read in the words "if the circumstances are changed." I do not find those words in the clause, and I hesitate about reading them in. But be that as it may, the employers are now proposing to shew that the state of circumstances which they wish to bring before the county court judge are different from those which were brought before him when he made his award. It is said that they cannot do so because they are estopped by the previous award. I am not sure that that is so. There is no judgment upon which to found an estoppel, and, if abstract justice requires us to say whether there ought to be an estoppel in the present case, I cannot help seeing that the question of the amount of the man's wages has never been determined on the merits at all. I cannot feel sure that the result of this state of things is that there is an estoppel. I feel the greatest hesitation in editing an Act of Parliament, and reading in words which are not to be found there, though I have been much impressed by the fact that clause 12 is so drawn that it is open to abuse by using it as the means of giving an appeal that is not given by the statute itself. On the whole, I am afraid that I cannot agree in the interpretation of the clause that has commended itself to my learned brethren.

ROMER L.J. In substance, this is an application to reopen an award when the fact which it is sought to dispute should have been contested at the original hearing, and this is done under cover of Sched. I, clause 12, of the Act. In my opinion, that clause is directed to another purpose altogether, and is not

intended to enable an original award to be impeached on any such ground as that relied upon in the present case. The power given is a valuable one, and enables the amount of the weekly payment to be reviewed where a change in the circumstances has taken place since the award was made: that is the real object of the clause. Here, however, the facts are now as they were at the date of the award: no new fact has been brought forward by either party, and both sides when they came before the county court judge were bound to admit it. A decision in favour of the appellants would lead to great abuse; it would lead to this—that whenever a party was dissatisfied with the amount awarded he could in effect have a fresh arbitration as often as he liked until he got an award in his favour. I do not think that we are bound to give an interpretation to this clause which would lead to such a curious result.

Appeal dismissed.

Solicitors for appellants: *W. Hurd & Son.*

Solicitors for respondent: *Cunliffes & Davenport, for Davies & Forshaw, Warrington.*

W. J. B.

1900
June 14.

In re JOHN REID & SONS, LIMITED.

Company—Winding-up—Appointment of Liquidator after Winding-up Order —Official Receiver—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *ss.* 4, 6.

After an order for the winding-up of a company has been made, the Court has no power to appoint a liquidator other than the official receiver until an application has been made under s. 6 of the Companies (Winding-up) Act, 1890, for the appointment of a liquidator in his place.

APPEAL from the decision of the county court judge of Leeds.

John Reid & Sons, Limited, was registered in September, 1895, as a limited company under the Companies Acts. In the year 1900 a resolution was passed for the voluntary winding-up of the company, and the shareholders appointed a Mr. Blackburn to act as liquidator. Mr. Blackburn in this capacity summoned a meeting of the creditors of the company on May 1, 1900, at which resolutions were passed appointing a committee of inspection and in favour of the continuance of the voluntary winding-up of the company, and Mr. Blackburn was requested as liquidator to take steps to oppose a petition which had been presented, on March 27, 1900, in the county court for the compulsory winding-up of the company. On the petition coming on for hearing on May 14, 1900, the judge made an order for the compulsory winding-up of the company and appointed Mr. Blackburn liquidator. The official receiver appealed against this order.

Arthur Russell, for the official receiver. The county court judge had no jurisdiction to make the appointment. By s. 4 of the Companies (Winding-up) Act, 1890, on an order for winding up a company being made by the Court the official receiver becomes ipso facto the provisional liquidator of the company. The case is governed by *In re North Wales Gunpowder Co.* (1) No liquidator can be appointed until a meeting

(1) [1892] 2 Q. B. 220.

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of creditors has been summoned under s. 6 of the Act of 1890 by the official receiver as provisional liquidator, for the purpose of determining whether a liquidator shall be appointed in the place of the official receiver.

Muir Mackenzie, for the petitioning creditor.

P. F. S. Stokes, for Mr. Blackburn. No doubt s. 4 of the Act of 1890 and *In re North Wales Gunpowder Co.* (1) shew that the Court has no power to appoint a provisional liquidator, but the power to appoint a liquidator given by s. 92 of the Companies Act of 1862 is not impaired. The Court in this case appointed Mr. Blackburn liquidator, and not provisional liquidator. That distinguishes the case from *In re North Wales Gunpowder Co.* (1) It was unnecessary to call a meeting of the creditors under s. 6 of the Act of 1890, since such a meeting had already been held in the voluntary winding-up, and the creditors had expressed their determination that Mr. Blackburn should be the liquidator. That section says that the Court may make any appointment and order required to give effect to such determination, and this was done by appointing Mr. Blackburn liquidator. The effect of s. 4 of the Act of 1890 is merely to make the official receiver provisional liquidator during such time as no liquidator is in existence; but there is nothing to limit the discretion of the Court under the Companies Act, 1862, to appoint a permanent liquidator, as it has done here.

Arthur Russell was not called upon to reply.

GRANTHAM J. No doubt this matter is not absolutely free from difficulty, because the Act does not distinctly say what is to be done under all the circumstances. Any one, however, who reads s. 6 of the Act of 1890 cannot but see that the whole scheme of appointment in the later Act is inconsistent with the scheme of appointment in the earlier Act. Lindley L.J. says, in his judgment in *In re North Wales Gunpowder Co.* (2), that every one knows why the scheme of appointment in the earlier Act was altered: "The object of the change of scheme is obvious enough and perfectly well known to every one acquainted

(1) [1892] 2 Q. B. 220. (2) [1892] 2 Q. B. 220, at p. 223.

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Grantham J.

with windings-up. We can all remember the contest that used often to take place as to who should be liquidator. The object was costs and costs only, and the whole scheme of this Act was to stop that." The Act of 1890, therefore, did away with the appointment as provisional liquidator of a person who was a friend of either one or the other of the creditors. In this case it certainly does look as if the gentleman who got appointed had friends among a considerable number of the creditors, and that he called this meeting and got them to appoint him liquidator. I do not, of course, say that it was so, but it does look as if that which has been done in this case is exactly that which the Act of 1890 intended should not be done. Under these circumstances, we think that the provisions of the Act of 1890 are so thoroughly inconsistent with the Act of 1862 that the county court judge had no power to appoint this gentleman liquidator. The provisional liquidator—that is to say, the official receiver—was in existence, and it was his duty to summon a meeting of creditors to determine who should be appointed, and, as that was not done, the appointment was invalid, and this appeal must be allowed.

CHANNELL J. I am of the same opinion. I quite appreciate and agree with the argument that the power of appointing a liquidator given by the Companies Act, 1862, is not expressly taken away by the Act of 1890, but I think that the scheme of the Act of 1890 is inconsistent with that power. I think that the real scheme of the Act of 1890 is to have an official who shall be both provisional and permanent liquidator unless another person is appointed, and that that other person is not to be appointed until the creditors have been consulted. It is true that in this case it happens that the creditors had been consulted, and, if the learned county court judge had discretion in the matter, I do not say that he has wrongly exercised it, because he might think, not unreasonably, that it was a mere useless expense to summon the creditors and ask them over again the same question as had been asked them before; but it was not exactly the same question, because, so far as I know, under the voluntary liquidation it was not open to the

creditors to have had for liquidator the official receiver, as they could do if they wished under the compulsory winding-up. It is not absolutely clear, therefore, that the creditors might not have come to a different conclusion if they had been again consulted; but I think it is an answer to the contention that they had already been consulted and had arrived at a decision as to who should be the liquidator, that they had not in fact been consulted in the way that the Act of 1890 says that they should have been consulted prior to any appointment. I therefore think that the appeal must be allowed.

Appeal allowed.

Solicitors for official receiver: *Solicitor to the Board of Trade.*

Solicitors for petitioning creditors: *Wrensted & Hind, for Scott & Holmes, Bradford.*

Solicitors for liquidator: *Vincent & Vincent, for North & Sons, Leeds.*

A. P. P. K.

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1900
Aug. 2.

[IN THE COURT OF APPEAL.]

THE LYLE SHIPPING COMPANY, LIMITED *v.* THE CORPORATION OF CARDIFF.

Ship—Demurrage—"Ship to be discharged with all reasonable despatch as customary"—Discharge into Railway Wagons—Deficiency of Wagons—Liability of Charterer.

A ship was chartered to load a cargo of wood, to be carried to the port of Cardiff, and then to be "discharged with all reasonable despatch as customary." The custom at the port of Cardiff was to discharge such a cargo into the wagons of certain railways that had access to the quay. The charterers arranged with one of these railways for the supply of wagons to take the cargo. Without any negligence on their part, but owing to stress of work at the port, by reason of which there was a deficiency in the number of wagons available, the discharge of the ship was delayed. In an action against the charterers for the detention of the ship:—

Held, affirming the judgment of Bigham J., that the charterers having done their best to procure the appliances that were customarily used at the port for discharging such a ship, and having used them with proper despatch, were not liable for the delay.

APPEAL from a judgment of Bigham J. at the trial without a jury.

The plaintiffs were the owners of the ship *Cape Wrath*, and the defendants were indorsees of a bill of lading for the cargo of the ship, in which bill of lading were incorporated the terms of the charterparty. The action was brought to recover demurrage or damages for detention at the port of discharge. The charterparty contained the following clause: "The ship to be discharged with all despatch as customary." The ship with a cargo of Jarrah wood arrived at Cardiff, the port of discharge, on October 2, 1899, and the discharge began in the East Bute Dock on the next day and was not completed until November 23, occupying a period of forty-five working days. The plaintiffs alleged that the discharge should have been completed in twenty-three working days, and they claimed in the action 382*l*. The East Bute Dock is the property of the Cardiff Railway Company, who do the work of discharging.

The wagons of certain railway companies had access to the quay, and the defendants accordingly made an arrangement with the Great Western Railway Company, one of these companies, for the supply of railway wagons to convey the cargo from the ship's side to the corporation depot.

At the time of the discharge there was a great stress of work at Cardiff, and a consequent difficulty in procuring railway wagons to receive the cargo. The learned judge found that the appliances customarily used for the purpose of discharging at Cardiff such vessels as that of the plaintiffs were the wagons of certain specified railway companies, of which the Great Western Railway Company was one; that the defendants used their best endeavours to get the services of those appliances; that they were not guilty of any neglect in taking discharge of the cargo, and that they used the appliances with proper despatch; and he gave judgment for the defendants.

The plaintiffs appealed.

July 18. *Joseph Walton*, *Q.C.*, and *Leck*, for the plaintiffs. If the contract is to unload in a certain number of days the charterer takes all risk; if there is no certain number of days all reasonable despatch must be used under the existing circumstances. The introduction of the words "as customary" imports a new element, though Lord Blackburn expressed a contrary opinion in *Postlethwaite* v. *Freeland*. (1) The customary discharge in that case was by warping lighters out to the discharging ship, and only a limited number could be used, and the consignee had nothing to do with providing them. In the present case the consignee had to provide wagons, and it was not a case of a specific but limited apparatus for discharging. The judgment of Bramwell L.J. in *Wright* v. *New Zealand Shipping Co.* (2) is an authority in favour of the plaintiffs. There is a distinction between discharging and carrying away the goods. The consignee was under obligation to have wagons at the place of discharge to take the goods when discharged, and if he could not obtain them he in effect required the goods to be warehoused in the vessel, and he must

(1) (1880) 5 App. Cas. 599. (2) (1878) 4 Ex. D. 165.

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pay for the time during which they were warehoused. The custom of the port is to discharge into wagons, and relates to the method by which the consignee is bound to discharge, and not to his getting the means of discharge to the spot. The consignee is bound, as decided in *Hick* v. *Raymond* (1), to use despatch in unloading, using the ordinary means of unloading; but that has nothing to do with his obligation to provide the means.

[They cited *Good* v. *Isaacs* (2) and *Kruuse* v. *Drynan*. (3)]

Rufus Isaacs, *Q.C.*, and *Bailhache*, for the defendants. *Postlethwaite* v. *Freeland* (4) was not merely decided on the facts of that case, but laid down a broad principle that the consignee is bound to use reasonable diligence in the circumstances in which he is placed. Whether he has done so is a question of fact, and that fact has been found by the learned judge in the defendants' favour. The defendants used reasonable diligence to obtain the appliances for unloading which are customary at this port, and there is no distinction between this case and *Wyllie* v. *Harrison* (5), which was approved in *Good* v. *Isaacs*. (2) Another decision that is applicable to the present case is *Castlegate Steamship Co.* v. *Dempsey* (6), where Lord Esher speaks of a ship being discharged with all such despatch as is consistent with the "manner and process" wherewith every vessel going to the particular port is discharged.

Joseph Walton, *Q.C.*, in reply.

Cur. adv. vult.

Aug. 2. A. L. SMITH L.J. read the following judgment:— This is an action by shipowners against the receivers of cargo under a bill of lading for demurrage or damages for detention—it matters not which it is called—of the plaintiffs' ship at Cardiff, which was the port of discharge, the allegation being that the ship was detained by the defendants in unloading for forty-five instead of twenty-three working days, and the

(1) [1893] A. C. 22.
(2) [1892] 2 Q. B. 555.
(3) (1891) 18 Court Sess. Cas. 4th Series, 1110.
(4) 5 App. Cas. 599.
(5) (1885) 13 Court Sess. Cas. 4th Series, 92.
(6) [1892] 1 Q. B. 854.

plaintiffs claim for this the sum of 382*l*. The real question is—What is the contract the plaintiffs have with the defendants as to the discharge by them of the plaintiffs' ship? By the terms of the charterparty, which were incorporated into the bill of lading, by which terms the defendants are bound, the cargo was "to be discharged with all despatch as customary."

It will be noticed that the plaintiffs have taken no contract from the defendants, as they might have done if they had desired to do so, that the cargo should be discharged in any fixed period of time, in which case beyond question the obligation to discharge undertaken by the cargo owners would have been absolute, and no matter what unforeseen circumstances might have arisen or how diligent they might have been in their endeavours to discharge the ship within the contracted time, if they did not do so they would have broken their contract and must have paid damages to the shipowners for the breach. But this is not the contract which the plaintiffs have taken from the defendants, for the only contract, as before stated, is that the cargo should be "discharged with all despatch as customary."

I think it is important to state at the outset the findings of my brother Bigham, for, considering the arguments addressed to us on behalf of the appellant shipowners, the findings are very important in this case. The learned judge finds that the rule or custom of the port of Cardiff, as applicable to the plaintiffs' ship, was that the cargo was to be delivered into wagons (railway wagons) and in no other way; that the appliances customarily used at the port of Cardiff were the wagons of certain specified railway companies and no others; that the defendants were not personally guilty of any negligence at all in taking discharge of the cargo, and that they did their best to get the appliances which were available at the port at the time, and which were customarily used for the purpose of discharging vessels; that when the plaintiffs' ship arrived there was a great stress of work, and difficulties had to be contended with, and that it was a record month, and that the defendants did their best to deal with the difficulties, and took delivery of the cargo as quickly as it was practicable for

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them to do. The findings were really not contested before us, and there is evidence to support them.

Now, these being the facts as found by the learned judge, the question arises—Have the plaintiffs proved that the defendants have broken their contract with the plaintiffs that the cargo should be discharged with all despatch as customary? That the plaintiffs have no absolute contract with the defendants that the latter will discharge the plaintiffs' ship in any given time is clear, nor have they, in my judgment, an absolute contract that the defendants will have railway wagons down upon the quay ready to take delivery of the cargo at Cardiff, which is the only way delivery can there be taken, for, as Lord Blackburn says in the House of Lords in *Postlethwaite* v. *Freeland* (1): "If the obtaining lighters or other customary appliances for the discharge of a ship on its arrival was, like the procuring a cargo for loading the ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. . . . But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo." This appears to me to meet the last suggestion made in the reply of Mr. Joseph Walton that there was an absolute duty on the goods owner to prepare himself to take the cargo. In my judgment the duty is not absolute, but to do his best.

Now, the contract which the plaintiffs have in this case with the defendants for the discharge of the cargo, as will be seen from the latest authority upon the subject in the House of Lords—no fixed time being stipulated for the discharge—is that the plaintiffs will discharge the cargo within a reasonable time under existing circumstances, or, in other words, with all due diligence having regard to all the existing circumstances, and, in my opinion, there is no limit as to what are existing circumstances, as argued by Mr. Joseph Walton—namely, the limit of the user of the port appliances. The case to which I

(1) 5 App. Cas. 599, at p. 620.

allude is that of *Hick* v. *Raymond* (1) in the House of Lords, and when what is therein laid down is understood it will be seen that the defendants' contract is what I have said it is.

In *Hick* v. *Raymond* (1) the terms of the contract were that the cargo was to be delivered at the port of London, and that it was to be applied for within twenty-four hours of the ship's arrival; but no time was specified within which the discharge of the cargo was to be completed. It was held by the House of Lords in a considered judgment that when a bill of lading is silent as to the time within which the consignee is to discharge the cargo his obligation is to discharge it within a reasonable time, and that he performs his obligation if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming those circumstances, so far as they involve delay, are not caused or contributed to by him. Lord Herschell, then Lord Chancellor, in his judgment in that case, in clear and unambiguous language states the law applicable to a bill of lading which contains no fixed time for unloading. I am myself inclined to think that it matters not in this case whether the words "as customary" are in the contract or not, for if not they would be implied. The Lord Chancellor said (2) that the bills of lading in that case contained no stipulation that the discharge should be effected in a particular number of days, "and, therefore, in accordance with ordinary and well-known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, has the appellant (the shipowner) proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied." Lord Herschell then states the rival contentions of the shipowner and cargo owner, the shipowner contending that the cargo owner was liable if the discharge of the vessel was delayed beyond the time required to discharge her under ordinary circumstances; the cargo-owner, on the other hand, contending that he was not

(1) [1893] A. C. 22. (2) [1893] A. C. 22, at p. 28.

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liable if he only occupied the necessary time under existing circumstances. Lord Herschell then continued—and here is the principle to be applied to the present case—"the only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances, I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee." It will be seen Lord Herschell says that "reasonable time" should depend on the circumstances which actually exist. What circumstances? Why, all the circumstances which have relation to the discharge of the cargo. The judgment of Lord Watson, though shorter, in no way differs from that of the Lord Chancellor, and Lord Ashbourne's judgment is valuable for bringing together prior decisions, especially that of Blackburn J. in *Ford* v. *Cotesworth* (1), in which that learned judge held that reasonable time must be a reasonable time under the circumstances, and the judgment of Lord Selborne, when Lord Chancellor, in *Postlethwaite* v. *Freeland* (2), which was delivered some twelve years before Lord Herschell delivered his judgment in *Hick* v. *Raymond* (3) above referred to. Lord Selborne said the same as Lord Herschell subsequently said, though in different language. He said: "There is no doubt that the duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charterparty, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated.

(1) (1868) L. R. 4 Q. B. 127. (2) 5 App. Cas. 599, at p. 608.
(3) [1893] A. C. 22.

If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time; that is (as was said by Blackburn J. in *Ford* v. *Cotesworth* (1)) 'a reasonable time under the circumstances.' Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence ought (I think) to be taken into consideration."

These judgments of two Lord Chancellors in the House of Lords on the point I have now to consider, coupled with the facts found by the learned judge in this case, to my mind are amply sufficient to shew that the judgment of Bigham J. is correct, and cover all the points taken by Mr. Joseph Walton in argument.

It appears to me simply waste of time to discuss in detail other authorities cited in argument, such as *Good* v. *Isaacs* (2), *Castlegate Steamship Co.* v. *Dempsey* (3), and *Wyllie* v. *Harrison* (4), which are all consistent with the judgments in *Postlethwaite* v. *Freeland* (5) and in *Hick* v. *Raymond* (6), and, with the exception of *Wright* v. *New Zealand Shipping Co.* (7), decided in 1878, before *Postlethwaite* v. *Freeland* (5) in the House of Lords, there is not a single case in this country in the plaintiffs' favour. As regards the case of *Wright* v. *New Zealand Shipping Co.* (7), in my judgment it is not now law, dissented from and discussed as it has been on different occasions, and especially by Lord Blackburn in *Postlethwaite* v. *Freeland* (8), and inconsistent, as it is, with the two cases in the House of Lords. If, however, the case of *Wright* v. *New*

(1) L. R. 4 Q. B. 127.
(2) [1892] 2 Q. B. 555.
(3) [1892] 1 Q. B. 854.
(4) 13 Court Sess. Cas. 4th Series, 92.
(5) 5 App. Cas. 599.
(6) [1893] A. C. 22.
(7) 4 Ex. D. 165.
(8) 5 App. Cas. 599, at pp. 616, 617.

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A. L. Smith L.J.

Zealand Shipping Co. (1) is to be upheld upon the ground suggested by Lord Herschell in *Hick* v. *Raymond* (2), namely, that it was not shewn in that case that the cargo owner could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier, and so have avoided the delay which took place, then, if that be the ground of the decision, the case is not hostile to the defendants, for the findings in this case are that they had taken all reasonable precautions and exertions and done their best as regards the discharge of the cargo, and the case has therefore no application to the present. I think that the present case upon the facts found is amply covered by the highest authority, that all Mr. Joseph Walton's points are equally covered, and that this appeal must be dismissed.

VAUGHAN WILLIAMS L.J. read the following judgment:—I agree. The learned judge has found such facts in this case as to put the owners out of Court, whether or not one treats *Wright* v. *New Zealand Shipping Co.* (1), and the law as laid down by Bramwell, Cotton, and Thesiger L.JJ., as overruled by the House of Lords and the judgments of the House of Lords to which reference has been made.

I think I should have arrived at the conclusion in fact in this case, taking all the evidence as to the practice of the port of Cardiff, that the defendants took upon themselves to supply all the appliances ordinarily required for the discharge of a ship in that port, including therefore trucks. I see nothing in the evidence to shew that the discharge at Cardiff was to be into appliances to be provided or determined by the port. It is true that the discharge was to be into railway trucks, but there is nothing to shew that the defendants might not have provided trucks from any source they chose, and used the railway to introduce their trucks on the quay to take discharge, or that the railway was blocked. But for the findings of the learned judge I should have thought there was an obligation on the defendants to provide the trucks, and have them ready, and that this

(1) 4 Ex. D. 165. (2) [1893] A. C. 22, at p. 32.

obligation was not affected by the fact that no time was fixed by contract for taking delivery.

A. L. Smith L.J. read the following judgment of

ROMER L.J. The first question we have to consider is as to the meaning of the not uncommon provision in a charter-party as to the ship being discharged "with all despatch as customary." I think it is now settled that such a provision means that the discharge shall take place with all reasonable despatch, and that in considering what is reasonable you must have regard, not to a hypothetical state of things (that is, to what would be reasonable in an ordinary state of circumstances), but to the actual state of things at the time of discharge, and, in particular, to the customs of the port of discharge. So that a charterer is not liable for delay if he has (under the circumstances) used all reasonable diligence in procuring the discharge, and in considering what is reasonable diligence you must have regard (inter alia) to the appliances for discharge customary at the port.

That principle, to my mind, is established finally by *Postlethwaite* v. *Freeland*. (1) Before that case some doubt existed on the subject chiefly by reason of some observations which had been made by Bramwell L.J. and Cotton L.J. in *Wright* v. *New Zealand Shipping Co.* (2), and which had been dissented from by Lord Herschell. But that the principle I have mentioned was established by *Postlethwaite* v. *Freeland* (1) is, I think, clear from the addresses of the noble Lords in that case, and especially from the observations of Lord Selborne and of Lord Blackburn, and in particular the remarks of Lord Blackburn, as to the distinction between the obligation of loading and the obligation of discharging the ship. This view of *Postlethwaite* v. *Freeland* (1) has been generally adopted, as, for example, by the judges who decided *Castlegate Steamship Co.* v. *Dempsey* (3) in the Court of Appeal, and by those who decided *Wyllie* v. *Harrison*. (4)

(1) 5 App. Cas. 599.
(2) 4 Ex. D. 165.
(3) [1892] 1 Q. B. 854.
(4) 13 Court Sess. Cas. 4th Series, 92.

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Romer L.J.

I think we ought to follow *Postlethwaite* v. *Freeland* (1) in this case, for I do not think this case can be distinguished on principle, having regard to Bigham J.'s findings of fact, which appear to me to be supported by the evidence. From these findings it is clear that by the custom of the port the discharge of the ship could only be into wagons to be supplied by the railway companies who had access to the Cardiff Docks; and, further, that though they used all reasonable diligence, the charterers could not get wagons to receive the discharge according to the custom, so that the delay was not caused by any default on their part. It follows from the above view of the law, as settled by the House of Lords, and of the facts of this case, that the present appeal must, in my opinion, be dismissed.

But before parting with the case I desire to say something with reference to an ingenious argument of Mr. Joseph Walton. He suggests the following view with regard to the law as laid down in *Postlethwaite* v. *Freeland* (1): That though the charterer is only bound to use reasonable care and diligence in effecting the actual discharge of the ship, he is still absolutely bound to have ready at the moment the ship arrives in port all the appliances for discharge, such as lighters, that can be used at the port, and all the men necessary to effect the discharge. I cannot find any judgment supporting such a view of the law, or drawing a distinction between the duty of a charterer in regard to circumstances up to the time the discharge begins, and his duty in respect to the actual discharge after it has commenced. It does not appear to me reasonable to make such a distinction. To use an example, I cannot see on principle why a charterer should not be liable if he uses reasonable care and diligence in keeping his men to work after the discharge has begun, and yet should be liable for not getting his men together ready for discharge, though he has used all reasonable care and diligence to procure them. Such a distinction appears to me an unjustifiable refinement of the law as laid down in *Postlethwaite* v. *Freeland* (1), and one not supported by any observation of any of the noble Lords who

(1) 5 App. Cas. 599.

decided that case, or by any clear expression of opinion of any judge in any other case.

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Appeal dismissed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Riddell & Co., for J. L. Wheatley, Cardiff.*

A. M.

In re LEACH.
Ex parte BARNES.

1900 *Aug.* 3.

Bankruptcy—Practice—Small Bankruptcy—Release of Trustee—Subsequent Assets—Right of Creditors to appoint New Trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 82, 121—*Bankruptcy Discharge and Closure Act*, 1887 (50 & 51 *Vict. c.* 66), *s.* 6, *sub-s.* 2.

In a summary bankruptcy, as in an ordinary bankruptcy, after the release of the trustee or of the official receiver acting as trustee, the creditors have no power to appoint a new trustee to administer further assets that may come in; but the official receiver is the trustee for that purpose, if necessary.

APPLICATION for an order directing the Board of Trade to certify the appointment of a Mr. Barnes as trustee in the bankruptcy of R. Leach.

On December 8, 1885, a receiving order was made in a county court against the bankrupt, and adjudication followed.

According to the bankrupt's statement of affairs, his assets were estimated at 470*l.* 7*s.* 1*d.*, and his liabilities amounted to 656*l.* 10*s.* 4*d.*; and by an order of the county court his estate was ordered to be administered summarily under s. 121 of the Bankruptcy Act, 1883, and thereupon the official receiver became the trustee.

When the official receiver had realized and distributed all the property of the bankrupt that he could discover, he applied, under s. 82 of the Act, to the Board of Trade to be released from the trusteeship, which was granted to him on January 21, 1889.

Early in 1900 the bankrupt, who was still undischarged,

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became entitled on the death of his mother to certain property, and in May the official receiver, at the request of certain of the creditors, called a meeting of the creditors for the purpose of appointing a new trustee. The meeting was held on May 21, when the creditors by a large majority passed a special resolution appointing Mr. Barnes trustee, with a committee of inspection. The Board of Trade declined to certify the appointment of Mr. Barnes as trustee. They took up the position that the appointment of a new trustee after the release of the original trustee was invalid, because s. 82, sub-s. 4, of the Act provides that after the original trustee has been released "the official receiver shall be the trustee." (1)

Mr. Barnes thereupon applied to the Court for a decision as to the validity of the objection, and asked that the Board of Trade should be ordered to certify his appointment.

Reed, Q.C., and *Davis*, for the application. Sect. 82 only applies to the case of an ordinary bankruptcy, and does not exclude the right of the creditors in a summary bankruptcy under s. 121 to appoint a trustee at any time in the place of the official receiver.

Muir Mackenzie, for the Board of Trade. Sects. 82 and 121 must be read together, and the proviso in s. 121 does not apply where the official receiver acting as trustee has been released, which is equivalent to the close of the bankruptcy. The creditors cannot appoint a new trustee after the official receiver

(1) The Bankruptcy Act, 1883, s. 82 (after providing for the release of the trustee), enacts (sub-s. 4): "Where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the official receiver shall be the trustee."

Sect. 121: "When a petition is presented by or against a debtor, if the Court is satisfied . . . . that the property of the debtor is not likely to exceed in value 300*l.*, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications:—

"(1.) If the debtor is adjudged bankrupt the official receiver shall be the trustee in the bankruptcy.

"(2.) There shall be no committee of inspection . . . . Provided that the creditors may at any time by special resolution resolve that some person other than the official receiver be appointed trustee in the bankruptcy, and thereupon the bankruptcy shall proceed as if an order for summary administration had not been made."

has been released. Sect. 6 of the Bankruptcy Discharge and Closure Act, 1887, supports this view. (1)

Reed, Q.C., in reply.

WRIGHT J. I find some difficulty in this case, but, as I have formed a strong opinion upon it, I do not think I shall do any good by considering it further.

I think that the Board of Trade are right. It seems to me, in the absence of any authority, that in the case of an ordinary bankruptcy, when the trustee has been released under s. 82 of the Act on the one particular ground that the estate has been, so far as he can ascertain, fully realized and wound up, then in that case sub-s. 4 of the same section prevents the appointment of any future trustee by the creditors, because it enacts that when all that has happened, when there has been a release on the ground of complete realization—something like a close or determination of the bankruptcy—that the official receiver shall thereupon be the trustee. It seems to me that there is a very good reason why some such provision should have been made, because, when to all appearance the estate has been completely got in and distributed, it is very much better to have some one permanent official to take the charge of any future assets that may come in, in the very rare cases in which they do come in, than to have any uncertainty in the matter. After the lapse of time the original creditors, whose judgment might be trusted in such a matter as appointing a trustee, have to a great extent disappeared, or many things may have happened which would make their control of the matter one which no longer ought to be encouraged. If that is the case in an ordinary bankruptcy, I think that gives a clue to the proper construction of s. 121. The proviso in that section no doubt says in terms that the creditors may "at any

(1) The Bankruptcy Discharge and Closure Act, 1887, s. 6, enacts (sub-s. 2): "Sect. 82 of the Bankruptcy Act, 1883 (which section relates to the release of a trustee), shall with the exception of sub-s. 4 thereof apply to an official receiver or official assignee when he is or is acting as trustee, and when an official receiver or official assignee has been released under that section he shall continue to act as trustee for any subsequent purposes of the administration of the debtor's estate . . . ."

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LEACH, *In re.* BARNES, *Ex parte.*

Wright J.

time," by special resolution in the case of a summary bankruptcy, resolve that some person other than the official receiver be appointed trustee, and that thereupon the bankruptcy shall proceed as if an order for summary administration had not been made. But even on the face of it, that looks to me as if the proviso was intended to apply only whilst there is something continuing which can be fairly described as the proceeding of the bankruptcy; and that is to my mind exactly the same thing, or involves the same dividing line, as that adopted in s. 82, namely, that when the official receiver is acting as trustee under a summary bankruptcy, and has been released on the ground that the whole estate has been got in, so far as he can get it in, and, therefore, that he is entitled to a release under s. 6 of the Act of 1887, then the same consequence follows as under s. 82, and he shall continue to act as trustee for any subsequent purpose of the administration of the debtor's estate. It can hardly be contended, if I am right in construing s. 82 as to ordinary bankruptcies, that s. 121 is intended to apply a different rule to summary bankruptcies, and to extend the powers of the creditors in summary bankruptcies down to a period beyond that at which they are removed by s. 82 in the case of ordinary bankruptcies. I think, therefore, that the view taken by the Board of Trade is right.

Solicitor for applicant: *R. Chapman.*

Solicitor for respondent: *Solicitor to the Board of Trade.*

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1900
Aug. 8.

BROWN *v.* PETO.

Mortgage—Lease by Mortgagor in Possession—Occupation Lease—Inclusion of Incorporeal Hereditament—Mansion-house, Furniture, and Sporting Rights—Foreclosure by Mortgagee—Lease binding on Mortgagee—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 18.

A mortgagor of land while in possession leased for fourteen years the mortgaged house, together with the furniture in it and land adjoining it, and the sporting rights over the remainder of the mortgaged land, which had been let, before the mortgage was created, to agricultural tenants, with a reservation of sporting rights. The mortgagee having foreclosed:—

Held, that the lease was valid as against the mortgagee under s. 18 of the Conveyancing Act, 1881.

Judgment of Bigham J., [1900] 1 Q. B. 346, affirmed.

APPEAL from a judgment of Bigham J., reported [1900] 1 Q. B. 346.

The action was brought to recover possession of a house and premises known as Knowlton Court, and for a declaration that the defendant never had any right of shooting or sporting over the estate known as the Knowlton estate, and for mesne profits.

The plaintiff brought his action for possession on the ground that the defendant was a yearly tenant to the plaintiff of Knowlton Court, and that the tenancy was duly determined by notice before writ, and he brought his action for a declaration as to the sporting rights on the ground that the defendant claimed without title to exercise such rights.

The defence was that the house and the sporting rights were both held by the defendant under a lease for fourteen years granted by one Lewis D'Aeth, and dated November 26, 1890, by which lease it was alleged that the plaintiff was bound.

The question was whether the lease was binding on the plaintiff, but further questions as to confirmation of the lease by the plaintiff or his predecessors in title and as to estoppel by acquiescence were raised in the Court below, but are not dealt with in the judgment of the Court of Appeal.

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It appeared that Knowlton Court and the Knowlton estate were in the year 1887 in mortgage to the plaintiff's predecessors in title, Lewis D'Aeth, the beneficial owner, being then in possession. On November 26, 1890, the mortgage being still in existence, a lease was granted by Lewis D'Aeth to the defendant of "First, all that capital messuage or mansion-house, with the stables, coach-houses, and other outbuildings, gardens, and pleasure grounds and orchard thereto belonging containing eleven acres or thereabouts . . . . together with the Canterbury Gate Lodges belonging thereto, and the right to use the roads to the said lodges and also to the Dower Gate Lodge, together also with the furniture and fixtures and other effects in or about the said mansion-house . . . . Secondly, all that part of Knowlton Park situate opposite the mansion-house, and containing forty-five acres or thereabouts. Thirdly, all that piece or parcel of meadow land called or known by the name of Dog Kennel Pasture, in the parish of Knowlton aforesaid, containing eight acres and five perches, or thereabouts . . . . and, fourthly, the right of shooting and sporting over the whole of the lessor's Knowlton estate, containing about 1900 acres . . . . together with the keeper's lodge at the Dower Gate to the park . . . . Together with the appurtenances thereto belonging . . . . To hold the premises hereby demised unto the lessee for the term of fourteen years from the 25th day of March, 1890 . . . . Yielding and paying therefor during the said term the rents following—that is to say, in respect of the premises firstly and fourthly hereby demised the clear yearly rent of 315*l.* 10*s.* In respect of the premises secondly hereby demised the clear yearly rent of 55*l.* And in respect of the premises thirdly hereby demised the clear yearly rent of 13*l.*" The lessee covenanted to pay the yearly rents and certain taxes, and also that he would "before the 24th day of June next expend the sum of 746*l.* 18*s.* 6*d.* in internal repairs and decoration to the said mansion-house throughout, in remodelling the drainage thereof, and in doing other works . . . ." And it was thereby agreed that the lessee should be allowed to deduct the sum of 748*l.* 5*s.* 10*d.* from the rents reserved, at the rate of 50*l.* per quarter till the whole sum should be repaid. There

was also a covenant by the lessee to keep the interior of the house and the furniture in good repair.

The payment of interest on the mortgage having fallen into arrear, an order for foreclosure was made. Subsequently some dispute arose between the plaintiff and the defendant, which ended in a letter to the defendant stating that he was only a yearly tenant, and inclosing a notice to quit drawn on that assumption.

The 1900 acres over which sporting rights were granted to the defendant by the lease of November 26, 1890, were at that time in the hands of agricultural tenants, but with a reservation of the rights of sporting.

The learned judge held that the lease to the defendant was, under s. 18 of the Conveyancing Act, 1881, binding on the plaintiff as mortgagee, and gave judgment for the defendant. (1)

The plaintiff appealed.

July 24. *Dickens*, *Q.C.*, and *Warrington*, *Q.C.* (with them *Morton Smith*), for the plaintiff. The lease granted by the mortgagor does not come within the provisions of s. 18 of the Conveyancing Act, 1881, and is not valid as against the mortgagee. The defendant, therefore, when the mortgagee foreclosed, became a yearly tenant on the terms of the lease, and his tenancy was determined by notice to quit. A mortgagor in possession may make an occupation lease, but if he leases part of the mortgaged land the lease must relate solely to that land, and must not include an easement over the rest of the land: *Dayrell* v. *Hoare* (2), approved by Lindley M.R. in *In re Gladstone*. (3) The right of sporting cannot be treated as if it were a part of the mortgaged land. There is no occupation of a right of sporting, no possession under a lease of such a right, and no entry is possible in respect of it. The interpretation clause, s. 2, does not apply, but, assuming it did, that would not affect this case, which is similar, so far as the bringing into the lease of an incorporeal hereditament, to *Dayrell* v. *Hoare*. (2)

(1) [1900] 1 Q. B. 346. (2) (1840) 12 A. & E. 356.
(3) [1900] 2 Ch. 101.

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It is sought to read into this Act words which occur in s. 6 of the Settled Land Act, 1882, relating to an "easement, right, or privilege of any kind." If it is suggested that the lease can be amended under 12 & 13 Vict. c. 26, s. 2, the answer is that the parties intended to do that which they carried out by the lease, and there is no mistake to amend. The furniture is included in the lease, and that, like the sporting rights, was not part of the mortgaged land. By the Conveyancing Act the best rent must be reserved; but that has not been done here because of the rebate in the yearly rent allowed on account of expenditure on the house. Had the mortgagee gone into possession during one of the earlier years of the lease he would have found that the rent reserved was not the best rent, but something less by reason of the permitted deductions. The lease includes an incorporeal hereditament which could not have been leased separately by the mortgagor.

Bray, Q.C., and *L. R. Atkin*, for the defendant. The right of shooting over the land let to agricultural tenants had been reserved. It was in hand, and it cannot be that the mortgagor had no right to deal with it. Land is defined by s. 2, sub-s. ii. so as to include incorporeal hereditaments, and, therefore, a lease of such hereditaments comes within the power given by s. 18. There can be no objection to the joining in one lease of two subject-matters as to each of which there is a power of leasing. Even if there were no power to grant a lease of an incorporeal hereditament by itself, this lease would be none the less an occupation lease because it included an incorporeal hereditament. A right of way or a right to light would be equally burdens on the land not leased, but it is impossible to suppose that such rights could not be granted with the part of the mortgaged land which they benefited—even if such rights standing alone could not be leased, they certainly can be dealt with in connection with the mortgaged land. As to the objection that the furniture is included in the lease, the rent arises out of the realty where a furnished house is let and not out of the furniture.

Dickens, Q.C., in reply.

Cur. adv: vult.

Aug. 8. A. L. SMITH L.J. read the following judgment:— Upon August 3, 1887, Mr. Lewis D'Aeth, who was the owner of the Knowlton Park estate, in the county of Kent, mortgaged it in fee to secure an advance of 30,000*l*. The estate consisted of a furnished mansion-house, stables, and gardens, of some demesne lands, and of agricultural lands of about 1900 acres in extent. At the time of this mortgage the 1900 acres were leased to agricultural tenants, the shooting thereon being reserved, as is very commonly the case, to the landlord. These shootings were thus severed from the occupation of the agricultural lands and were reserved to the landlord. After this mortgage Mr. D'Aeth was left in possession and enjoyment of the estate by the mortgagees. Upon November 26, 1890—that is, about three years after the mortgage—Mr. D'Aeth, by lease under seal, demised the whole estate, excepting the 1900 acres (which were then, as before stated, in lease to agricultural tenants), together with the shootings over the 1900 acres, to the defendant, Mr. Peto, for a term of fourteen years from March 25, 1890, at the rental of 383*l*. per annum. The parcels of this lease are as follows. They become, in my opinion, material when considering, as I must do, whether the lease is an occupation lease, so as to come within the meaning of s. 18 of the Conveyancing Act, 1881. The parcels are, first, the mansion-house, with stables, outbuildings, gardens, and pleasure grounds, containing eleven acres or thereabouts, together with the furniture and fixtures and other effects in the mansion-house; secondly, part of the park opposite the house, containing forty-five acres or thereabouts; thirdly, a parcel of meadow land known as Dog Kennel Pasture, containing 8A. 0R. 5P., or thereabouts; fourthly, the right of shooting and sporting over the whole of the lessor's Knowlton estate, containing about 1900 acres. In my judgment this is a lease of a very common description where a landlord is letting his mansion-house, grounds, and shootings reserved over lands leased to agricultural tenants, and was a well-known lease both before and since the Act of 1881.

It is sought by the mortgagee in the present action to eject Mr. Peto some four years before the lease would expire upon the

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ground that it is not authorized by the Conveyancing Act of 1881. Many points have been taken and argued, but the above point goes to the whole root of the case, and if Bigham J. was right in holding as he did that the lease was a valid lease and within the Act, no other points arise.

That s. 18 of the Conveyancing Act, 1881, was passed to enable mortgagors to grant leases as well as mortgagees is plain, and that the section also enacts in express terms what kind of leases mortgagors and mortgagees may grant is equally clear.

Now, what is it that s. 18 of the Conveyancing Act, 1881, enacts? To ascertain this I must read s. 18 and s. 2, the interpretation section, together. It enacts that a mortgagor of land—that is, of tenements and hereditaments whether corporeal or incorporeal—while in possession shall as against every incumbrancer have by virtue of the Act power to make from time to time any such lease of the mortgaged tenements and hereditaments, whether corporeal or incorporeal, or any part thereof, as in the section is described and authorized—that is to say, an agricultural or occupation lease for any term not exceeding twenty-one years, or a building lease for any term not exceeding ninety-nine years. This section also enacts that every such lease shall reserve the best rent that can reasonably be obtained, and shall contain a covenant by the lessee for payment of rent and a condition of re-entry on non-payment thereof. This being the section, the question arises whether the lease of November 26, 1890, is "any such lease of the mortgaged premises," or, in other words, whether the lease comes within either of the three classes of leases which s. 18 of the Act of 1881 expressly authorizes a mortgagor in possession to make, namely, an agricultural lease, an occupation lease, or a building lease. I agree that it is not an agricultural lease, nor is it a building lease; but why is it not an occupation lease? It is a lease by which the mansion-house and the stables and gardens, part of the park, and the incorporeal hereditament, that is, the right of shooting, severed as it was when the lease was made from the 1900 acres, are leased to the defendant for him to occupy. Why is this not an occupation

lease? It is a lease, as I have before said, of a very common description, and for myself, if not fettered by authority, I should have had no doubt but that it was an occupation lease. It was argued that a lease of the shooting per se would not be an occupation lease, for that no rent could be reserved, and that no right of re-entry could be reserved; but why could not both of these be reserved by contract? However, I do not decide this point, for what I have to deal with is not a lease of shooting per se, but a lease of a house, stables, and lands, and coupled therewith, and as incident to the occupation thereof, is the right of shooting over the lands already let to other lessees.

It is argued on behalf of the mortgagees that the case of *Dayrell* v. *Hoare* (1) shews that the lease of November 26, 1890, is an invalid lease, because, as the lease in that case was held not to be in accordance with the power granted in that case, so the present lease is not in accordance with the power given by s. 18 of the Act of 1881. But, in my opinion, this argument is fallacious, for the two powers are not the same. *Dayrell* v. *Hoare* (1) was decided in the year 1840, and had of course nothing to do with the Conveyancing Act of 1881 or the express statutory power given thereby to mortgagors to grant leases. The question which was raised upon demurrer was whether a lease which demised part of the premises, with the right of shooting over the whole, was a good execution of a power authorizing a lease of "the said several estates, hereditaments, and premises so given and limited"; and it was held that it was not, because that power did not authorize a lease of part of the land with liberty to sport over the rest, Littledale J. holding the lease bad on the ground that the entirety in the particular part was not demised, for the demise must be of the whole which covers the part demised, and Patteson J. saying that the power does not contemplate the separation of the incident from the land. It is quite true that *Dayrell* v. *Hoare* (1) was approved of by Sir Nathaniel Lindley in the case of *In re Gladstone* (2), where that learned judge says: "The decision in *Dayrell* v. *Hoare* (1) was plainly right

(1) 12 A. & E. 356. (2) [1900] 2 Ch. 101, at p. 105.

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both under the old law and the new law, namely, that a power for a tenant for life to lease settled estates, 'or any part or parts thereof,' did not authorize a lease of part of the land, with liberty to sport over the rest. It is clear that a power to lease land cannot enable a donee of the power to impose a burden on the land." I do not doubt the accuracy of *Dayrell* v. *Hoare* (1) or of the judgment of the Master of the Rolls in *In re Gladstone* (2); but in the present case the Conveyancing Act expressly enacts that the donee of the power may grant occupation leases for not exceeding twenty-one years, and that such leases may consist of both corporeal and incorporeal hereditaments. In the present case the right of shooting was severed before the lease in question was granted, and was an incorporeal hereditament the leasing of which the Act of 1881 expressly authorizes. Take the case of a lease by a mortgagor in possession of a mansion-house and grounds together with a right of way over lands leased to agricultural tenants: why would not such a lease be a good occupation lease within the Act? It seems to me that it would, and if so, the lease of the mansion-house and grounds in the present case together with the right of shooting over lands leased to agricultural tenants would equally be within the Act. The case of *Dayrell* v. *Hoare* (1) is no authority as to the true construction of s. 18 of the Act of 1881, and the learned judges who decided that case and Sir Nathaniel Lindley in *In re Gladstone* (2) were not dealing with what was the meaning of an express power to grant occupation leases of both corporeal and incorporeal hereditaments, which I have to deal with in this case. I can find nothing in the Act of 1881 to shew "a contrary intention" so as to exclude the interpretation of the word "land" in s. 2 (ii.), as including tenements and hereditaments corporeal and incorporeal, as was sought to be made out by the learned counsel for the mortgagees. In my judgment the lease in the present case is an occupation lease, and falls within s. 18 of the Act of 1881, and is a lease which the Act contemplated either a mortgagor or mortgagee should be empowered to grant.

For the reasons above, I think Bigham J.'s judgment as to

(1) 12 A. & E. 356. (2) [1900] 2 Ch. 101, at p. 105.

the validity of the lease of November 26, 1890, should be upheld, and this appeal dismissed.

VAUGHAN WILLIAMS L.J. read the following judgment:— The first question to be decided in this case is whether s. 18 of the Conveyancing Act, 1881, authorizes a lease by a mortgagor in possession of a mansion-house and adjacent land together with the right of shooting over other land, not included in the lease, but included in the mortgage security.

If this question is answered in the affirmative, it is conclusive of this action in favour of the defendant, and no other question need be answered.

Now s. 18 runs as follows: "A mortgagor of land while in possession shall as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land or any part thereof as is in this section described and authorized."

The description and authority contained in the section so far as material to the facts of the present case seem to be these. Sub-s. 3: "The leases which this section authorizes are, (i.) an agricultural or occupation lease for any term not exceeding twenty-one years." Sub-s. 6: "Every such lease shall reserve the best rent that can reasonably be obtained regard being had to the circumstances of the case, but without any fine being taken." Sub-s. 7: "Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days." Sub-s. 13: "This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed or otherwise in writing."

Now, in order to construe s. 18 it is necessary to refer to some definitions in the Act of words therein employed. By s. 2 (ii.), "Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land." By s. 2 (ix.), "Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the

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ton, or otherwise." (xi.) "A mining lease . . . . includes a grant or licence for mining purposes."

It is urged on behalf of the defendant, who contends that this lease falls within the description and authority of s. 18 of the Conveyancing Act, 1881, that, as land by the definition includes hereditaments, corporeal or incorporeal, the authority necessarily includes the right to lease shooting over land which is not itself demised to the lessee; but this seems to me to depend on whether the definition includes hereditaments which only come into existence by the exercise of the leasing power. The right of sporting has no existence as a hereditament until some grant or lease of it is made by the owner of the soil: it is, so long as enjoyed by the owner of the soil, a mere incident of ownership, and passes from one to another by a mere conveyance or lease of the land; and when a landowner reserves to himself the right of shooting, he does not really reserve or except anything from the conveyance or lease, but in law takes under a regrant from the lessee—i.e. not a mere licence, but a grant coupled with an interest.

But it is to be observed that, in the present case, at the date of the mortgage the lands over which the mortgagor purported to grant the right of sporting were already let on farm leases reserving the right of shooting.

It seems, therefore, that at the date of the mortgage the shooting rights over the farms existed as an incorporeal hereditament and fall within the definition of land. The incorporeal hereditament existed separately, and I think it does not matter for what term it had been granted.

But it is further urged that even if the sporting rights were severed before the date of the mortgage, and existed at that date as an incorporeal hereditament, and were leased as such, yet the case of *Dayrell* v. *Hoare* (1) shews that a lease of such sporting rights is not a lease of a part of the land as to which s. 18 of the Conveyancing Act, 1881, creates the statutory power; but I cannot accept this view. In *Dayrell* v. *Hoare* (1) the lease purported to be executed in pursuance of a power to lease the estates, hereditaments, and premises given to the

(1) 12 A. & E. 356.

tenant for life, or any part or parts thereof. Now, the estates, hereditaments, and premises given to the tenant for life appear to have been specific messuages and lands, and Littledale J. in delivering judgment says (1): "Nor is it a grant of a part; for, in the power, part is used with reference to the entirety which the tenant for life has. Thus, supposing the estate to consist of two houses and a thousand acres of land, the power enables the party to grant one house and one hundred acres. But the demise must be of the whole which covers the part demised: an easement cannot be granted by itself out of any separate part; that would be subjecting the land to a servitude." But in the present case the sporting rights existed as a part of the mortgaged property at the date of the lease, and I do not think *Dayrell* v. *Hoare* (2), when considered in light of that fact, has any application. It certainly is dependent on the nature of the entirety to be dealt with under that particular power, and on the entirety of the gift to that tenant for life. The sporting rights were not part of the gift to the tenant for life. The gift was exclusively corporeal, and an incident of the estate was not part of the entirety given.

At all events, *Dayrell* v. *Hoare* (2) is not an authority on the construction of the Conveyancing Act, 1881.

Some question was raised in the case as to whether the rent in the lease granted ought to be treated as an entire rent for mansion-house, land, and right of shooting, or to be treated as apportioned. On the point I am discussing—a lease of the right of shooting over land not demised to the lessee of the shooting—I do not think it matters a bit which way the question is answered. If the lease of such a right of shooting falls at all within s. 18, sub-s. 1, it does so equally whether the lease also comprises land or whether it does not do so.

I think that, having regard to the fact that before the mortgage the right of shooting had been converted into a several hereditament, the lease of it may fall within s. 18, sub-s. 1, provided the other conditions of the section are complied with.

(1) 12 A. & E. 356, at p. 368. (2) 12 A. & E. 356.

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Now, the following objections are made to shew that these conditions have not been complied with.

1. That this lease is neither an agricultural nor an occupation lease.

2. That no rent has been reserved, and therefore not the best rent.

3. That there is no re-entry reserved or possible on the incorporeal hereditament.

4. That all these matters forbid the application of s. 18 to incorporeal hereditaments, because the conditions imposed by that section shew a contrary intention.

To these objections perhaps another objection should be added—viz., that clause (xi.) of s. 2 by its definition of a mining lease as including a grant or licence for mining purposes, by implication excludes such grants or licences from other leases or as substantive leases.

I do not think that any of these objections should prevail.

I think that the words "occupation lease" may well apply to a lease of an incorporeal hereditament. Use and occupation lies, as is pointed out in *Bird* v. *Higginson* (1), for actual enjoyment of a fishery. Occupy is a word which in one form and another is not infrequently used of an incorporeal hereditament. Eviction, which presupposes occupation, is a term employed in respect of tithes.

I think that the word "rent" is used in this Act to include rent so called—that is, rent which does not issue out of the thing demised and in respect of which there can be no distress.

In case after case the word is used by judges in respect of such rent so called. In legislation also the word is used not infrequently in this sense. The very definition of rent in the Conveyancing Act, 1881, s. 2 (ix.), "rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise," shews that rent is not used in this Act in its strict sense.

In *Lord Hastings* v. *North Eastern Ry. Co.* (2) it was held by the Court of Appeal, affirming Byrne J., that in a grant of way-leave sums payable to the grantor in respect of traffic

(1) (1835) 2 A. & E. 696, at p. 702. (2) [1899] 1 Ch. 656.

passing over the line were a rent within the statute 32 Hen. 8, c. 34, and that the benefit of such rent ran with the reversion to the land.

As to re-entry I feel no difficulty. If there can be occupation and eviction there can clearly be re-entry.

I find there is nothing in these conditions imposed by s. 18 of the Conveyancing Act, 1881, to exclude a lease of an incorporeal hereditament from the statutory power given by the Act to the mortgagor, or that given to the mortgagee (s. 18, sub-s. 2).

It is only necessary in the present case to decide that, the sporting rights having been severed before the mortgage, the power of the mortgagor to lease applies to such an incorporeal hereditament; but I by no means decide that the power to lease under the statute would not extend to an incorporeal hereditament although unsevered until the making of the lease—that is to say, that I do not decide that the power may not apply to a case falling within *Dayrell* v. *Hoare*. (1) We have to construe an Act of Parliament not passed to give a limited gift to any one, not passed in the interest of the mortgagor or the mortgagee, but passed in the interest of the State, on the ground that it is contrary to the interest of the State that land should be so held that nobody can safely become the tenant for a term of years of either mortgagor or mortgagee in possession.

Certain conditions are made essential to the exercise of this power that the best rent shall be reserved which can reasonably be obtained.

I am by no means prepared to say that if the best rent can only be obtained by letting land in parts and giving the lessee of one part a right which constitutes in a sense a servitude over another part—such as a right of access, or rights of drainage, or rights of shooting—that this is not within the power.

In *Wilson* v. *Queen's Club* (2) it was held that a lessee under a lease made by a mortgagor in possession by virtue of s. 18 can restrain the mortgagor and those claiming under him from obstructing the lessee's enjoyment of a right to light.

(1) 12 A. & E. 356. (2) [1891] 3 Ch. 522.

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I have only to add that I do not think that the express powers in s. 2 exclude the power to make licences or grant privileges over mortgaged land not demised in cases other than mining leases. There is a reason for the express provision in mining leases based on the fact that the division of the land in mining cases is horizontal.

A. L. SMITH L.J. I have to add that the Lord Chancellor agrees with the result of these judgments.

Appeal dismissed.

Solicitors for plaintiff: *Kingsford, Dorman & Co.*
Solicitors for defendant: *Lee & Pembertons.*

A. M.

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May 18, 21.

THE QUEEN *v.* WINDER.

Justices—Quarter Sessions—Jurisdiction—Costs of Appeal—Costs of Licensing Justices on successful Appeal—Order to Pay Costs incurred by Clerk to Justices—Taxation—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29.

By s. 29 of the Alehouse Act, 1828, power is given to a court of quarter sessions, where a judgment of licensing justices is reversed upon appeal, to order "that the treasurer of the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment shall pay to such justice or to whomsoever he shall appoint such sum as shall in the opinion of such Court be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been put" in consequence of his having had served upon him notice of the intention of the party to appeal.

An order of quarter sessions, made upon the allowance of an appeal from the licensing justices of a borough, and directing the borough treasurer to pay to the clerk of the borough justices a certain sum of money for the reasonable costs, charges, and expenses to which he has been put in supporting the order of the licensing justices is bad, it not being an order for payment of a sum which in the opinion of the Court will "indemnify the justices" from the costs to which they have been put.

Where an order is made under the above section, the amount of the

costs, if not ascertained by the Court itself, should be ascertained by the taxation of the clerk of the peace, and his taxation should be adopted by the Court, during the currency of the sessions; the costs can only be taxed out of sessions by consent.

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ORDER NISI calling upon Robert Winder to shew cause why a writ of certiorari should not issue to bring up and quash an order of quarter sessions for the County Palatine of Lancaster. The following facts appeared from the affidavits.

At the general annual licensing meeting held on August 23, 1899, one Paisley had applied to the licensing justices of the county borough of Bolton for the renewal of an alehouse licence; the application was refused, the chairman stating that of the justices present twelve were in favour of the application and ten against it, and that two did not vote; Paisley thereupon gave due notice of appeal to the Lancashire Quarter Sessions against the refusal. On October 9 the justices for the borough of Bolton passed a resolution "that the clerk be instructed to have the cases under appeal fully represented at the court of quarter sessions, and incur such costs as the circumstances demand." Acting upon this resolution, Mr. Winder, the clerk to the justices for the county borough of Bolton, took the necessary steps to oppose the appeal on behalf of the justices. On October 23 the appeal was heard at quarter sessions; the licensing justices were represented by counsel, and a large number of witnesses were called on their behalf; the appeal was, however, allowed, and the licence renewed. At the conclusion of the hearing an application was made to the Court on behalf of the licensing justices for their costs, and an order was made by the court of quarter sessions upon the treasurer of the borough of Bolton for payment of their costs; that order, as drawn up, was in the following terms: "This Court doth order the treasurer of the county borough of Bolton forthwith to pay unto Robert Winder, Esq., the sum of 310*l.* 16*s.* 4*d.* for the reasonable costs, charges, and expenses which he hath been put to and hath incurred in supporting the act, order, or adjudication of William Nicholson, Esq., and others, justices of the peace of the said borough, whereby they refused to grant an alehouse licence to one James Paisley, for doing which this

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shall be the said treasurer's warrant." The sessions was then continued by adjournment to December 18, 1899.

On November 18 the costs were presented by Mr. Winder to the deputy clerk of the peace for the county for taxation, and were allowed by him at 310*l.* 16*s.* 4*d.*, the sum claimed; in his affidavit the deputy clerk of the peace said that sum was in his opinion sufficient to "fully indemnify the justices from all costs and charges which they had incurred in supporting their decision." The deputy clerk of the peace then signed the order upon the borough treasurer to pay this sum to Robert Winder as set out above, this being the form of order in general use in such cases at the Lancashire Quarter Sessions. Neither the corporation of Bolton nor the borough treasurer was a party to the appeal; they were not represented at the taxation, and could not consent to a taxation out of sessions, and therefore no notice of the taxation had been given to them. Subsequently nine of the borough justices (being a majority of those present when the resolution was passed to oppose the appeal at quarter sessions) signed an authority by which they appointed Mr. Winder, the clerk to the justices, to receive the sum of 310*l.* 16*s.* 4*d.*, "being the sum which in the opinion of the court of quarter sessions for the County Palatine of Lancaster is sufficient to indemnify us, the said justices, from all costs and charges to which the said justices have been put in the matter of an appeal," &c. On December 6 Mr. Winder attended on the borough treasurer and demanded payment of the sum mentioned in the order, which was shewn to him, but the borough treasurer refused to obey the order or to pay any sum for costs to Mr. Winder. On January 11, 1900, an order was made by Kennedy J. at chambers whereby the order of the court of quarter sessions was removed into the High Court for enforcement under 12 & 13 Vict. c. 45, s. 18, and on March 9, 1900, the present order nisi for a certiorari was granted upon the following grounds: (1.) that the taxation was bad, having taken place in the absence of the party ordered to pay; (2.) that the order was bad, because no bill of costs was served with it; (3.) that the order was bad in form, because it directed the treasurer to pay to Robert Winder the

sum of 310*l.* 16*s.* 4*d.* for the reasonable costs, charges, and expenses which he had incurred; (4.) that there was no consent to tax out of sessions; and (5.) that the power of quarter sessions was limited to granting costs incurred by the respondents in attending the court of quarter sessions and informing it of their reasons for their judgment.

Avory shewed cause against the rule. The order of quarter sessions was good. It is not an objection to the taxation that it took place in the absence of the party ordered to pay. The taxation was not in any sense a taxation between party and party; the borough treasurer was a mere paymaster, and had no right to be present at the taxation; nor had the corporation or the justices, who are not litigant parties in such an appeal. The case is analogous to that of an order at quarter sessions or assizes for the costs of a prosecution. Nor is the order bad because no bill of costs was served with it, for no bill of costs was necessary, as the amount of costs was named in the order. The order is not bad because it directs payment of costs to the justices' clerk instead of to the justices themselves, for before the hearing of the appeal the justices had expressly authorized their clerk to incur the costs necessary to oppose the appeal, and after the decision of the appeal they expressly authorized him by resolution to receive the amount of the costs; he was the person appointed by them for the purpose within the meaning of s. 29 of the Act of 1828. Where an order directs costs to be paid to the wrong person—for instance, to the party instead of to the clerk of the peace—it is an error in procedure only and not a defect of jurisdiction, and affords no ground for quashing the order: *Reg.* v. *Binney* (1); *Reg.* v. *Justices of Ely*. (2) The objection that there was no consent to a taxation out of sessions is founded upon the misapprehension that the taxation was one between the parties to an appeal. The last objection, that the power of quarter sessions is limited to granting costs incurred by the respondent justices in attending at quarter sessions and informing the Court of the reasons for their judgment, is founded upon an obsolete view of the law;

(1) (1853) 1 E. & B. 810; 22 L. J. (M.C.) 127. (2) (1855) 5 E. & B. 489.

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the justices are entitled to actively contest the appeal, and are, indeed, the only persons who can do so.

Lawson Walton, Q.C. (*Charles Mathews* with him), in support of the rule. The question is one of substance, though technical in form. The order is bad on the face of it, for it directs the borough treasurer to pay the clerk of the justices his costs, instead of directing him to pay the justices their costs, which is all that is authorized by s. 29 of the Act of 1828; it is obvious that the measure of costs might differ considerably in the two cases. Further, the order is bad because the jurisdiction of quarter sessions was never exercised in making it. Under s. 29 they can only order payment of such costs as in their opinion are sufficient to indemnify the justices: this question the quarter sessions never considered at all, but left the costs to be taxed by the deputy clerk of the peace as though it were an ordinary bill. The corporation are entitled to be protected by the exercise of the judicial discretion of quarter sessions, whether the corporation are present at the exercise of such discretion or not. The court of quarter sessions not having indicated their opinion as to what was sufficient to indemnify the justices, it was impossible for the taxing officer to express an opinion owing to the form of the order which directed the payment, not of the justices' costs, but of Winder's costs. The court of quarter sessions cannot delegate the duty imposed upon them by statute of determining these costs, though they may during the currency of the sessions at which the order is made adopt the acts of their officer: *Sellwood* v. *Mount* (1); *Reg.* v. *Long*. (2) A taxation after adjournment or out of sessions is only valid where the parties have (in the former case) an opportunity of attending the taxation, or where (in the latter case) there is a consent to a taxation out of sessions: *Reg.* v. *Mortlock* (3); *Midland Ry. Co.* v. *Edmonton Union*. (4)

Cur. adv. vult.

May 21. RIDLEY J. The question in this case is whether a certain order made by quarter sessions on appeal from a refusal

(1) (1841) 1 Q. B. 726.
(2) (1841) 1 Q. B. 740.
(3) (1845) 7 Q. B. 459.
(4) [1895] 1 Q. B. 357.

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of licensing justices to grant a licence to a person named Paisley should be quashed. The quarter sessions reversed the decision of the justices, and made, or professed to make, an order under s. 29 of the Alehouse Act, 1828, upon the treasurer of the borough of Bolton to pay to the justices a certain sum by way of costs; the question is whether under the circumstances the form in which that order was made was good or bad. Sect. 29, which is a long section, is directed to the double possibility of the appellant being successful or of his being unsuccessful on such an appeal. When the appeal is dismissed, the order is to be made by the Court that the appellant is to pay to the justices such sum by way of costs as shall in the opinion of the Court be sufficient to indemnify the justices. That is not the occasion which has arisen here. Then the section goes on to say that "in every case in which the judgment so appealed against shall be reversed," which is the case here, "it shall be lawful for such Court, if it shall think fit, to adjudge and order that the treasurer of the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment shall pay to such justice or to whomsoever he shall appoint such sum as shall in the opinion of such Court be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put." The justices are in fact put in the position of being the only persons who can appear to defend the order which has been made by them, and they are treated by this section so far as being concerned in the matter. In the event of their decision being supported, the appellant is to pay by way of costs to them such a sum as the Court thinks right; if, on the other hand, their decision be reversed, they are to ask for such a sum of money as the Court may think right according to the terms of the section to order to be paid to them by the treasurer of the county or place for which they were acting.

In the present case, the Court having arrived at the conclusion that the appeal should be allowed and that the decision of the justices should be reversed, made it part of their judgment, as I understand it, that costs should be given against

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the treasurer, thus shortly and informally putting into effect that part of the section which I have just read. That decision was carried out, as appears by the affidavit, in the following manner. The court of quarter sessions adjourned as usual. Having said that the costs were to be paid by the treasurer, they left it to their officer or clerk of the peace to find out what sum of money should be paid, and he, as appears by the affidavit, held what may be called a taxation, though no one appeared on the part of the person who would have to pay, that is to say, the treasurer of the borough, to dispute any of the items in the bill of costs. I may say that the bill of costs has been sent to us, and it contains a great many items in respect of what may be called profit charges as well as out of pocket expenses. It contains, for example, a large sum of forty guineas for drawing brief for counsel. I do not say that the bill is unfair in any way, but I say that it is certainly a bill which would properly be the subject of taxation in an ordinary case. The clerk of the peace did not disallow any items, but allowed the full amount charged, 310*l.* 16*s.* 4*d.* This taxation took place out of sessions, and no further proceedings ever took place before the court of quarter sessions which could be regarded as an adoption of it. This is what in fact took place. On the order being presented to the treasurer of the borough, he declined to acknowledge it; and the question now is whether it can be enforced or whether it is invalid, either as being bad on its face, or as having been made by a Court which had no jurisdiction to make it. I need hardly allude to the statement in the treasurer's affidavit in which he states in effect that he asked for a copy of the bill and was told that he was not entitled to it, seeing that the question for us is whether the order is good on the face of it.

One objection taken was as to the person to whom the money was ordered to be paid. It is an order upon the treasurer of the county borough of Bolton to pay unto Robert Winder, Esq., such and such a sum. It will be noticed that s. 29 of the Act provides that the order is to be that the treasurer of the county or place shall pay "to such justice or to whomsoever he shall appoint." The first objection taken is that the order should

have been for payment to the justices and not to Robert Winder, who, I will assume, had been appointed by the justices to act on their behalf. I do not think that is a good argument, for I think that the fact that Robert Winder had been appointed or designated by the justices as the person to whom the money should be paid would be sufficient, so that the fact that the order was for payment to him instead of to the justices would not invalidate it. *Reg.* v. *Binney* (1), as reported in the *Law Journal*, was cited in support of the argument; but a report of that case is also to be found in Ellis and Blackburn, and it may be desirable that it should be known that the report in the *Law Journal* is not by any means to the same effect as the report in the other authority. In the report as it appears in Ellis and Blackburn the Court were not clearly of opinion that the statute upon which the question arose, 11 & 12 Vict. c. 43, s. 27, applied to the case at all. Therefore it was not certain in their opinion that that section, which directs the costs to be paid to the clerk of the peace and to be by him handed to the party, whereas they had in point of fact been paid direct to the party, applied to the case. It may be that there was an expression of opinion, and I think there was by one of the members of the Court, that even if it were so the defect was only an informality and an error in procedure which could be amended; still the Court seems, in the first instance, to have had a great deal of difficulty in coming to the conclusion that the statute applied at all. The objection in the present case seems to me to be one which could be got over.

I come, however, to another objection, which is that in this particular case, instead of the order being for such a sum as in the opinion of the Court is sufficient to indemnify the justices, it orders payment by the borough treasurer to Robert Winder of the sum of 310*l.* 16*s.* 4*d.* for the reasonable costs, charges, and expenses which he has been put unto and has incurred in supporting the act, order, or adjudication of the justices. Now, s. 29 provides that the sum to be paid shall be such as in the opinion of the Court is sufficient to indemnify the justice; but

(1) 1 E. & B. 810; 22 L. J. (M.C.) 127.

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this order is that the sum paid is to be for the reasonable costs, charges, and expenses of the justices' clerk. I think that there is a sufficient distinction. I can see, I think, that different considerations would apply to the question, How much does indemnify a justice for the costs to which he is put? and to the question, How much is to be allowed a solicitor instructed on behalf of certain justices to support an order? The one is to be treated, to begin with, as a bill of costs incurred and tendered by a solicitor; the other as an indemnity to the justices. It may be that the difference would often only be fractional; but in the present instance, having seen the bill of costs, I am satisfied that this is a substantial distinction. I think, therefore, that the order is bad, because on the face of it it directs a sum to be paid which is the sum due to Robert Winder for the costs to which he has been put, whereas under the statute it ought to have ordered that there should be paid to the justice or to whomsoever he should appoint such sum as should in the opinion of the Court be sufficient to indemnify such justice from all costs and charges.

I mention another point which arose during the argument, namely, that it appears upon the affidavits that the sum was arrived at in the way which I have mentioned—that is to say, by the officer of the court of quarter sessions out of court, not at the sessions at which the decision was given. That objection also can be taken notice of on the present occasion, because, if it is true, it goes to the jurisdiction of the Court to make the order, and it shews that the justices at quarter sessions have not done what the statute directs them to do—that is, they have not directed by their order such a sum to be paid as in their opinion would be sufficient to indemnify the justices, for certainly the law is that, although the Court may by its officer, if it so thinks fit, arrive at the sum which is to be paid in respect of costs, yet they must do so at the same session and they must adopt their officer's taxation as an act of their own. That conclusion is, I think, supported by *Sellwood* v. *Mount* (1) and *Reg.* v. *Long* (2), and by the subsequent case

(1) 1 Q. B. 726. (2) 1 Q. B. 740.

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of *Midland Ry. Co.* v. *Edmonton Union.* (1) That seems to be the general law, and I think it would apply, although the words in s. 29 are such as to indicate that the opinion of the Court is to be taken on the sum. Some of the cases decided—in fact, I think most of them—turn upon sections where those words do not occur; they are simply sections giving the Court a discretion as to costs. But although this section provides that the opinion of the Court is to be taken, I take it that that opinion could be arrived at if, after having appointed their officer, they adopted his act in ascertaining the sum which might be due. Again, the amount may be ascertained out of sessions, and out of the particular sessions, by the consent of the parties; but here there was no such consent. I therefore think that, as it appears upon the affidavits that this sum was ascertained by the officer out of sessions without adoption by the Court and without the consent of the parties, it is not a sum which has been arrived at as in the opinion of the Court sufficient to indemnify the justices from all costs, charges, and expenses whatsoever to which they may have been put. For these two reasons, it appears to me that this order cannot be supported.

BIGHAM J. I am of the same opinion. I think the order is bad in two respects. It is bad upon its face, because it does not state that the money is to be paid to any person whom the justices have appointed to receive it, and it is bad because the court of quarter sessions have not in my opinion exercised any jurisdiction in making it. Sect. 29 of the Alehouse Act, 1828, under which the order purports to have been made, directs that when an appeal from the decision of a justice shall be allowed the Court may, if it thinks fit, order that the treasurer of the county shall pay "to such justice or to whomsoever he shall appoint" such sum as shall in the opinion of the Court be sufficient to indemnify such justice from all costs and charges whatsoever to which he may have been so put. Now, it appears upon the affidavits that Mr. Winder, in whose favour the order purports to have been made, has never been

(1) [1895] 1 Q. B. 357.

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appointed as a person to receive the money in question. Some of the justices appear to have consented to his appointment, but all the justices who are entitled to the indemity have not in fact consented, and I do not think, therefore, that the order is in point of form right.

But I think a far more serious question arises in considering whether the court of quarter sessions have exercised their jurisdiction under this section at all. What have they power to do? They have power to order the treasurer of the county or place to pay such sum as shall "in the opinion of such Court be sufficient to indemnify such justice" from the costs and charges incurred. The court of quarter sessions never has formed in this case any opinion at all upon the matter—that is, upon the sum sufficient to indemnify the justices. It is true that they have made an order that the treasurer shall pay, but as to how much he is to pay they have never formed or expressed any opinion at all. What the treasurer is to pay is the costs and charges to which the justice may have been put. What does that mean? I take it that it means "may have been properly put." There has been no taxation at all of this bill of costs in the proper sense of the word. A very large bill was brought in by the solicitor who represented the justices and placed, as I understand, before the clerk of the peace. The person who had to pay, the treasurer of the corporation, had no notice of this so-called taxation. He did not know what was going on, and his voice has never been heard in the matter. Not a penny piece was taken off the bill, and I do not believe that any real taxation took place. In proceedings such as these I am of opinion that the person who is ordered to pay should have an opportunity of coming before the taxing officer, whoever he may be, and of being heard as to what he should pay. He should have an opportunity, as all persons have who are ordered to pay costs, of making objection to the items which are charged against him. That right is in accordance with common sense and with justice, and in this case the treasurer of the corporation has not had that right given to him. The court of quarter sessions has never formed any opinion as to what costs or charges the justices in the

Court below were put to, and this order ought never to have been drawn up, and it must therefore be quashed.

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REG. v. WINDER.

Rule absolute.

Solicitors for borough treasurer: *Holt-Beever & Co., for Hinnell, Bolton.*

Solicitors for clerk to justices: *Indermaur & Brown, for Winders, Bolton.*

W. J. B.

In re AN ARBITRATION BETWEEN MASTERS AND THE GREAT WESTERN RAILWAY COMPANY.

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May 25, 29, 30.

Lands Clauses Acts—Compensation—Lands injuriously affected—Lease of Colliery—Right of Lessee to sink Shaft in Land of Lessor not included in Demise—Reasonable Approval of Lessor—Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.

A lease of a colliery with its buildings, pits, shafts, and works, together with the veins of coal under a specified acreage of adjoining land the surface of which was not included in the demise, contained a proviso that the lessee might at any time during the term sink a pit or pits in any part of the lands the surface of which was not demised, but so that the position of the pits should be subject to the reasonable approval of the lessor. The lessor having contracted to sell a portion of the surface to a railway company, the company gave to the lessee a notice to treat in respect of his interest in the surface of the land taken by them, and the lessee gave to the lessor notice under the lease of his intention to sink a pit in the land so taken:—

Held, that the right to sink a pit in the land the surface of which was not included in the demise, although subject to the reasonable approval of the lessor, gave the lessee an interest in land which was the subject of compensation under s. 68 of the Lands Clauses Act, 1845.

SPECIAL CASE stated upon the award of an arbitrator appointed to determine a question of compensation under the Lands Clauses Act, 1845. The facts giving rise to the present proceedings were substantially as follows.

By a lease made on June 24, 1891, Colonel Vaughan Lee (the freeholder) demised to Mr. T. J. Masters, a colliery proprietor, for a term of sixty years from September 29, 1890, the

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right of getting coal under 335 acres of land (inclosed within a pink line on the plan attached to the lease), and also demised a piece of land coloured yellow on the plan, on which were the colliery buildings and the main shaft; no other pit had at the time of these proceedings been sunk on the area comprised in the lease. The demise was substantially of all the coal that could be got through the pit on the land coloured yellow, whether the coal was situated under the land coloured yellow or under any other portion of the 335 acres comprised within the pink line. No surface rights were demised, except over the land coloured yellow. The demised parcels were thus described in the lease: "All that piece of land situate in the parish of Llanharan in the county of Glamorgan coloured yellow in the plan hereinafter mentioned and all the buildings and erections thereon and the pits and shafts now open thereon and known as the Lanelay Colliery and Works and also all the seams and veins of coal which are intersected by and can be won and worked from the existing pit and such blackband ironstone and fireclay as may be associated therewith now lying in or under those several fields closes or parcels of land part of the Lanelay estate and the Great Western Railway running through the same land situate in the said parish of Llanharan and containing by estimation 335 acres or thereabouts and surrounded with the colour pink on the map or plan thereof on the last skin of these presents And all other seams or veins of coal blackband ironstone and fireclay below the said seams or veins of coal hereinbefore described And also all railways tramways roads way-leaves easements and conveniences belonging to or used in common with the said colliery and works together also with the rights and privileges to be exercised in connection with the said mines and minerals which are hereinafter particularly mentioned." The lease then proceeded to give the lessee liberty to work the mines and win and carry away the minerals thereby demised, "but without entering upon the surface of any of the said lands except the land coloured yellow on the said plan," and, after giving specific power to erect certain buildings on the land coloured yellow, provided that the lessee should have "all other privileges ease-

ments and advantages in and over the said land coloured yellow, and in, but not over, the said land surrounded by a pink colour," which should be necessary for working and carrying away the minerals; it further gave specific power to make roads through, under, or over the land coloured yellow, and through or under, but not over, the lands surrounded by a pink colour. The lease contained most of the clauses, covenants, and conditions usual in a colliery lease, and also the following special proviso: "Provided always and it is hereby agreed by and between the said parties hereto that if at any time during the said term hereby granted the said lessee his executors administrators or assigns shall think it necessary or desirable to sink a pit or pits on any part of the said land surrounded by a pink line other than the said land coloured yellow and other than the land surrounded with the colour purple (on or upon which no colliery operations of any sort may be carried on) and shall give notice thereof in writing to the said lessor his heirs or assigns, then the rights of sinking pits and working minerals as well the demised minerals as other minerals with the necessary spoil and rubbish and all other rights easements and privileges hereby conferred upon the said lessee shall extend to and become applicable to sinking such other pit or pits on the lands other than those coloured yellow and the working of such minerals with the necessary spoil and rubbish as fully and freely to all intents and purposes as if such rights easements and privileges had been originally extended to the whole of the lands surrounded by a pink colour, but so that the position of such pit or pits be subject to the reasonable approval of the said lessor his heirs or assigns or his or their agent for the time being."

On March 15, 1898, the Great Western Railway Company agreed in writing to purchase free from incumbrances from the lessor the freehold reversion in about five acres of the land comprised in the lease to the claimant, Mr. Masters, and on May 25, 1898, the company gave the claimant notice to treat in respect of the land which they had so agreed to purchase; this notice did not include the minerals, and the company never gave notice to the claimant that they required to take

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them. (1) On the same day (May 25, 1898) the claimant gave by letter to his lessor's agent a notice under the proviso in his lease of his desire to sink a pit upon that portion of the land in respect of which the company had given the notice to treat, and asking his approval of the site selected by him for the pit. The lessor never gave the required leave to sink, and the company afterwards entered upon the land. The claim of Mr. Masters for injuriously affecting the lands taken was subsequently referred to the determination of an agreed arbitrator.

The interest claimed by the claimant in the land taken was twofold: (1.) a yearly tenancy in the surface of the land, as to which the compensation was agreed in the course of the arbitration at 100*l.*; and (2.) the interest, if any, vested in the claimant under the clauses of the lease; in other words, the right to sink a pit upon the land taken in order to get the coal comprised in the lease. The arbitrator awarded 8900*l.* as compensation in respect of the latter interest, that amount being calculated on the basis of compensating the claimant for the additional expense which would or might thereafter have to be incurred by him because the railway company, by taking part of the land referred to in the clause of the lease, had made it impossible for him thereafter to sink a new pit if and when required upon the part of the land so taken. It was admitted that down to the date of the award the claimant had not commenced to sink a new pit, and had not applied to the railway company for leave to sink one. A special case was stated upon the award in order to determine the right of the claimant to compensation in respect of the interest claimed by him under the lease.

Howard Wright (*Lawson Walton, Q.C.*, and *Page, Q.C.*, with him), for the Great Western Railway Company. The interest claimed is not a proper subject of compensation under the Lands Clauses Act. As between himself and his lessee, the lessor was entitled under the proviso in the lease to refuse leave

(1) It was stated during the argument that the notice to treat was not in fact served until the following day, May 26.

to sink a pit in this particular spot; it is a reasonable ground for his refusal that he is about to deal with the surface land in a manner inconsistent with a right in the lessee to sink a pit. After receipt of the notice to treat, the lessor was in the position of being a trustee for the railway company of the right of refusal. The fact that the lessor's refusal of a licence to assign or underlet is to be "reasonable" does not amount to a covenant on his part to give his consent, even where his refusal would in fact be unreasonable: *Treloar* v. *Bigge*. (1) But, apart from the question of reasonable refusal, the vague right of sinking a pit in an undefined spot is not a subject of compensation at all under s. 68, which is confined to compensation "in respect of any lands or of any interest therein." Under that section it has been held that sporting rights, which were not conferred by deed, and therefore amounted to no more than an agreement or a licence, conferred no interest in land: *Bird* v. *Great Eastern Ry. Co.* (2) The section has no application to a benefit that may arise from the performance of a mere personal covenant. The right to sink a pit in the present case is not an easement, nor is it such a right as would run with the land, for it has no reference to the demised land; nor would the lessor's covenant to allow the sinking of a pit be binding in equity on the assignee of the land on the ground of notice, as it is at most only an affirmative covenant, and only restrictive covenants are so binding: *Haywood* v. *Brunswick Building Society*. (3)

Cripps, Q.C. (*James Fox* and *MacSwinney* with him), for the claimant. The claimant has an interest in land which has been injuriously affected, and is the subject of compensation under s. 68. No question of covenants arises in the case: the sole question is what interest in land was vested in the claimant by his lease. The fact that the lessor had received notice to treat from the railway company did not deprive him of his right or power of assenting to the sinking of a pit; the position of his lessee, the claimant, could not be affected by the advent upon the scene of the railway company. The reasonableness of the lessor's refusal is a question entirely between the lessor

(1) (1874) L. R. 9 Ex. 151. (2) (1865) 19 C. B. (N.S.) 268.
(3) (1881) 8 Q. B. D. 403.

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and the claimant; it has nothing to do with the railway company, who have merely contracted with the lessor to purchase the surface land "free of incumbrances"—that is, to purchase it, if it can be so conveyed. In estimating the reasonableness of a refusal of consent by the lessor, one cannot take into account the fact that a refusal would be reasonable having regard to the lessor's contract to sell the land to some one else; the lessor cannot justify a refusal on the ground that he can make a better contract with a third party. A right to sink a pit subject to the lessor's reasonable approval is essential to a mining lease. The lease in the present case is in effect a lease of the whole property, with an exclusion of surface rights except over the ground coloured yellow, and a demise of the right of sinking a pit; there is an actual grant of a right in the nature of an easement or a quasi-easement. The right of the claimant to compensation comes within the definition of Thesiger L.J. arguendo in *Metropolitan Board of Works* v. *McCarthy* (1), "Where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an additional marketable value to such property apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value"; that definition was approved by Lord Cairns in that case, and subsequently by the Court of Appeal in *Ford* v. *Metropolitan Ry. Co.* (2) The right of sinking a pit is a right given by the demise, rendering the occupation of the minerals more valuable. The same basis of compensation that is here contended for was applied in *Whitehouse* v. *Wolverhampton and Walsall Ry. Co.* (3), a decision which was approved by Lord Watson in *Holliday* v. *Wakefield Corporation.* (4) [He also cited *Bates* v. *Donaldson*] (5); *Solway Junction Ry. Co.* v. *Jackson* (6); *Fleming* v. *Newport Ry. Co.* (7)]

(1) (1874) L. R. 7 H. L. 243, 253.
(2) (1886) 17 Q. B. D. 12.
(3) (1869) L. R. 5 Ex. 6.
(4) [1891] A. C. 81.
(5) [1896] 2 Q. B. 241.
(6) (1874) 1 Rettie, 831.
(7) (1883) 8 App. Cas. 265, 281.

Lawson Walton, Q.C., in reply. No right of the claimant in connection with his property in the minerals has been injuriously affected by reason of the railway company taking the surface, for he had no unqualified right to penetrate to the surface at any particular spot. All that the claimant got under the lease was a qualified right to sink a pit under a proviso upon a covenant. The necessity or desirability of the right for the claimant is not the only test to apply; the right is subject to the lessor's reasonable approval, and the right of the claimant is a right to come to the surface provided that it can be done without injury to the surface owner, whoever he may be. Such a conditional proviso as that in the lease was no fetter on the lessor's right to sell the surface. [He cited *Hayles* v. *Pease* (1); *Love* v. *Bell.* (2)]

Cur. adv. vult.

May 30. DARLING J. This matter came before us upon a special case stated by an arbitrator, and it is necessary for me at the outset to state some of the facts. It appears that by a lease of June 24, 1891, Colonel Vaughan Lee demised to Mr. Masters "all that piece of land situate in the parish of Llanharan in the county of Glamorgan coloured yellow in the plan hereinafter mentioned and all the buildings and erections thereon" and known as the Lanelay Colliery and Works. No question arises as to that part of the demise, but I think it necessary to call attention to the fact that the words "hereby demises" are not repeated, but govern the words that immediately follow, "and also all the seams and veins of coal which are intersected by and can be won and worked from the existing pit, and such blackband ironstone and fireclay," and so on, "now lying in or under those several fields closes or parcels of land part of the Lanelay estate and the Great Western Railway running through the same land situate in the parish of Llanharan and containing by estimation 335 acres or thereabouts and surrounded with the colour pink on the map or plan thereof . . . . together also with the rights and privileges to be exercised in connection with the said mines and minerals

(1) [1899] 1 Ch. 567. (2) (1884) 9 App. Cas. 286.

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which are hereinafter particularly mentioned, to hold the same unto the lessee from the 29th day of September, 1890, for the term of sixty years subject to the provisions hereinafter contained." Then it goes on: "the lessee may at all times during the said term (but subject to the restrictions hereinafter expressed) deepen the said pits and shafts and sink search for win work by long wall or otherwise, and so as to let down the surface or otherwise, paying compensation as hereinafter mentioned, and may raise get stock convert and carry away the mines and minerals hereby demised but without entering upon the surface of any of the said lands except the land coloured yellow on the said plan."

Now, the lessee had a right to work and get all the minerals under the portion coloured pink, and those mines and minerals were expressly demised to him. But so far he had no right to sink a pit upon the pink portion of the land. Then the lease contained a proviso—and this is an important matter—"provided always and it is hereby agreed by and between the said parties hereto that if at any time during the said term hereby granted the said lessee his executors administrators or assigns shall think it necessary or desirable to sink a pit or pits on any part of the said land surrounded by a pink line other than the said land coloured yellow and other than the land surrounded with the colour purple (on or upon which no colliery operations of any sort may be carried on) and shall give notice thereof in writing to the said lessor his heirs or assigns then the rights of sinking pits and working minerals, as well the demised minerals as other minerals, with the necessary spoil and rubbish and all other rights, easements and privileges hereby conferred upon the said lessee shall extend to and become applicable to sinking such other pit or pits on the lands other than those coloured yellow and the working of such minerals with the necessary spoil and rubbish as fully and freely to all intents and purposes as if such rights, easements and privileges had been originally extended to the whole of the lands surrounded by a pink colour." Therefore, the minerals under the pink colour are demised to Mr. Masters. That proviso gives him the right, if he wishes, to work those minerals and (there being no pit upon

the pink portion, but only upon the yellow portion) to sink a pit upon the pink portion in order to conveniently get and work the minerals demised to him under the pink portion. Now, to stop there: that would be an absolute right to sink such a pit upon any part of the pink ground, but the proviso goes on to say, "but so that the position of such pit or pits be subject to the reasonable approval of the said lessor his heirs or assigns or his or their agent for the time being." That being so, although Mr. Masters had a right to sink a pit upon that pink land in order to work the minerals demised to him underneath it, yet he could not do so without some sort of control by Colonel Vaughan Lee, the lessor, and his assigns; and that control was to be so that the position of the pit was to be subject to the reasonable approval of Colonel Vaughan Lee. One of the questions which arises here, and that the most important, is, Does this give Mr. Masters an interest in the land—a property in this land (the pink portion) under which he has the minerals?

What subsequently happened was this: Colonel Vaughan Lee entered into an agreement with the Great Western Railway Company on March 15, 1898, to sell them a piece of land out of the land coloured pink, and he was going to sell them all the rights he had; but he would have to sell the land subject to the right which was in Mr. Masters for sixty years to work the minerals lying underneath it. Further than that, the surface was subject to this burden: that in order to work those minerals Mr. Masters might have a right to sink a shaft upon that very piece of land—that little island, in fact, in the pink portion which Colonel Vaughan Lee agreed to sell to the Great Western Railway Company. If Mr. Masters wished to do so, he would have to get the reasonable approval of Colonel Vaughan Lee, or, if Colonel Vaughan Lee had sold to the railway company (supposing this agreement had been carried into effect and the land had passed, and all Colonel Vaughan Lee's interest had passed, to the railway company), then it seems to me he would have to get the approval—which must be reasonably exercised—of the railway company, who would stand in the same position to him as Colonel Vaughan Lee.

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Then, to my mind, it is plain that Mr. Masters has an interest, a property, in that piece of land which the railway company are going to take by virtue of the agreement of March 15, 1898.

On May 25, 1898, the railway company gave Mr. Masters a notice to treat. At that time he had not said to them a word about desiring to sink a shaft upon the land, and of course it is remarkable, and it is open to very obvious comment, that whereas he had never until then said that he wished to sink a shaft upon this bit of land, he did on May 25, 1898, give notice that he desired to sink a shaft upon that very bit of pink ground which the railway company intended to take. Of course, it has been suggested to us that that was not bonâ fide, that it was only a means of making a railway company pay what they often do, namely, blackmail, that he did not want to sink a pit at that point, that there was plenty of land upon which he could have sunk the pit, and that this was only a means of enhancing the price which he was going to get. However that may be, it does not matter, supposing he had a right to sink a pit at this particular place. Though I say it is not necessary for us to go into it, and I do not think we have a right to go into it, it is perfectly easy to allege a prejudicial motive on the part of Mr. Masters which does not exist, because one cannot help knowing that with regard to a colliery property it is very fallacious to say, "Why is that particular point so important to you, when you have got 335 acres, of which one part is as good as another?" One cannot know anything about collieries without knowing that that is not so; that, for example, it is very detrimental to sink a pit at a point where you have a lot of water to deal with. It may very well be that on the whole of the 335 acres there is only one spot, or there are only one or two spots, where if you do sink a pit you will not have to deal with a lot of water which will necessitate expensive pumping as long as the colliery is left open. It is impossible also not to know that the strata are not horizontal, that it may be a very much cheaper thing to sink your pit at one particular place to get on to the strata and work up the strata, and so always have the full trams

coming down to the pit without any haulage, than to sink the pit at a place where owing to the dip of the strata you will sink only to the top of the strata, and would have continually to haul the coal up the workings by some mechanical means before it can be got to the foot of the pit, and so increase its cost. Therefore, it may very well be that the prejudice amounts to nothing, and that this is of all places the most convenient and advantageous place upon which Mr. Masters could have sunk a pit for the working of that colliery; and apparently the arbitrator came to that conclusion, that it would be necessary some day to sink a pit in order to work the demised coal under the pink portion, and that the proper place to sink it was just upon this piece of land, which the railway company were going to take. However that may be, it seems to me that Mr. Masters had a right to select that particular portion and to say, "I want to sink my pit there." It is true that Colonel Vaughan Lee would have had a right to say, "I do not approve of your sinking it there," and if he could reasonably say so, if upon all the facts it were reasonable that he should say so, then Mr. Masters would have to sink a pit somewhere else.

It seems to me that if the land passes to the railway company they take it with the same burden that Colonel Vaughan Lee is subject to, and they take it with the right of Mr. Masters to come to the surface at that particular place, unless they can shew that it is not reasonable that he should do so, because it is equally convenient that he should come to the surface somewhere else, and an overwhelming disadvantage that he should come at that particular spot. I think that he comes within the definition given by Mr. Thesiger in *Metropolitan Board of Works* v. *McCarthy* (1), and adopted by Lord Cairns in the following language: "Mr. Thesiger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an

(1) L. R. 7 H. L. 243, 253.

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additional market value to such property apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if by reason of such interference the property as a property is lessened in value." Now the railway company are going to take some property, and it seems to me that they do, in the exercise of their powers, interfere with this right of the claimant, which is a right to come to the surface and bring his minerals to the surface at that particular spot, unless he comes within the exception that it is not reasonable that he should do so. It is said that this cannot be; that Colonel Vaughan Lee would be entitled to refuse his consent, and if the railway company by agreement with Mr. Masters take the place of Colonel Vaughan Lee, then they would be entitled to refuse, because they could say, "No, it is not reasonable that you should come there; and we will not approve." With regard to Colonel Vaughan Lee, it is said that if the property has not passed, and if it is still in him, Mr. Masters has no valuable property of this kind at all; that the right to come to the surface at that point does not exist because (and I fancy this is the real point upon which our opinion is desired) Colonel Vaughan Lee has entered into an agreement to sell this piece of ground, and of course he cannot sell it for as good a price with this right over it to come to the surface as he could without it, and that the right has not been exercised with regard to that piece of ground, because at that date he had had no notice that Mr. Masters desired to come to the surface there; that Colonel Vaughan Lee had agreed to part with his interest in that piece of pink land, and that the fact that he had done so was sufficient to justify him in saying, "It is reasonable that I should refuse to allow you to come to the surface there, because I am going to part with that bit of ground."

Then it is said that we ought to hold (as I understand it) as a matter of law—I think it might be a question of fact, because everything would have to be taken into consideration in order to see what was reasonable in the approval or disapproval of Colonel Vaughan Lee—that, because he has said, "I will sell this to the railway company," it cannot be reason-

able that Mr. Masters should ask to exercise his right to come to the surface at that particular spot. It appears to me that that argument is a bad one for this reason—that if it is true of a small piece of ground, it is true of a large piece. Where could you limit it? How could you say, it is true of half an acre, but it would not be true of an acre; it is true if he sold half an acre of the ground that it cannot be reasonable that Mr. Masters should say, "I want to come to the surface in that half acre"; it is not true if he has sold all but half an acre? How can you say so? As I have pointed out, the question of area will not settle it; it is no answer to say, "There are 335 acres; we have sold five; you have got 330 of them left; come to the surface in one of those." It is no answer, because area, upon the question of a colliery and of a pit, is not the most important consideration at all. It may be that the one little bit taken, if it were only fifty square yards, might be of more value to the lessee than all the rest of the surface put together.

Now, that being so, let us test the argument in this way. I say that if it is true of the small piece, it is true of it all. If it is good to say, "You cannot reasonably call upon me to approve, because I have entered into a contract to sell five acres of the land," then it would be true, it seems to me, to say so, even if the answer were, "You cannot call upon me to allow you to come to the surface with your pit, because I have sold the whole of the land." But that reduces the thing to an absurdity, because, if that is so, Colonel Vaughan Lee, the day after making this lease to Mr. Masters, might have agreed to sell the whole of the land, and could then have said to Mr. Masters, "I have agreed to sell the whole of the land, and the purchasers are going to make a building estate all over it. If you have a right to come to the surface with your pit, my contract becomes an impossible one. Nobody will take the estate upon such terms as that you are to be allowed, when anybody has put a house there, to come up like a mole from under the ground and to bring your coal up in the middle of his hall or his parlour." Such a position would be impossible. Colonel Vaughan Lee, it appears to me, could not sell the

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whole of the estate, and then turn round upon Mr. Masters and say, "You cannot call upon me reasonably to approve of your coming up with your pit, because I have entered into a contract to sell the whole of the estate, and your right is gone." The consequence would be that there would be the coal demised to Mr. Masters, which he would not be able to work at all, or which he would only be able to work in so far as he could get it out by the pit upon the yellow patch of ground. If this is true of the whole estate, it is true of every portion of the estate; and it appears therefore to me that it is impossible to say that for that reason it would be a sufficient excuse for Colonel Vaughan Lee to say, "No, as I have sold part of it, you cannot reasonably call upon me to approve of your having a pit here or there."

The claimant has, as it seems to me, a right to come to the surface—not an absolute right upon any given piece of land, but as good a right upon one part of it as he has upon the other—as good a right upon this piece which is being sold as upon any other piece of a similar area, and no worse because there are other portions where he could come; that right, it seems to me, is injuriously affected by the exercise by the railway company of their compulsory powers which they exercise by means of this notice to treat. It seems to me that he has, within the definition by Mr. Thesiger which was accepted by Lord Cairns, something which gives an additional market value to his property, and that there is a title to compensation because by the interference of the railway company that property is lessened in value. If all the railway company have done is to purchase what Colonel Vaughan Lee had, then they purchased subject to the disabilities which Colonel Vaughan Lee had laid himself under. If Colonel Vaughan Lee had said to Mr. Masters, "I am under an obligation to allow you to sink a pit upon this piece of ground, but for reasons of my own I will not do it," and if the question had been litigated whether his approval was reasonably or unreasonably withheld, then if it were unreasonably witheld there could be, as against Colonel Vaughan Lee, a right to damages in Mr. Masters. If the railway company have taken by agreement that which Colonel

Vaughan Lee had, they are now under the same disabilities as Colonel Vaughan Lee, and if they refuse for purposes of their own to allow Mr. Masters to come to the surface at this spot, it seems to me that they would be liable to an action just as Colonel Vaughan Lee was. If, on the other hand, they are taking by means of statutory powers—taking without any kind of question, of option or refusal or anything of the kind—simply taking by means of statutory powers what Mr. Masters has got, then they are taking from him the right to work his minerals at that spot, which is as good a right as his right to work them at any other spot upon the pink ground; and as the right would have to be valued if it had been taken over the whole of the pink, so in principle it appears to me to be just the same if only a portion is taken and not the whole. They do, by so much as they take, affect what is a right in him; they do, by so much as they take, diminish the value of the property that he has. Therefore, I think that our decision here must be in favour of Mr. Masters and against the railway company for the reasons that I have given.

BUCKNILL J. I agree with the result of my learned brother's judgment, and I have only a few observations to add. I begin by saying that this case has given me a great deal of difficulty, and I was much puzzled during the arguments as to the view I ought to take. The first question of law really arises upon the proper construction of the indenture of June 24, 1891—that is to say, What is the nature of the interest which Mr. Masters, the lessee, took under the lease to him from Colonel Vaughan Lee? As we know, it is beyond doubt that in the first place he took a demise for sixty years of the piece of land coloured yellow, and also of the seams or veins of coal under an acreage of about 335 acres of ground, and also he took this—the rights and privileges (and I consider this to be an important part of the matter) "to be exercised in connection with the said mines and minerals which are hereinafter particularly mentioned." Now, the clause about which so much has been said is this: "that if at any time during the said term hereby granted the said lessee his executors administrators

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or assigns shall think it necessary or desirable to sink a pit or pits on any part of the said land surrounded by a pink line," &c., "and shall give notice thereof to the said lessor his heirs or assigns then the rights of sinking pits and working minerals, as well the demised minerals as other minerals with the necessary spoil," &c., "shall extend to and become applicable to sinking such other pit or pits on the lands other than those coloured yellow"—I am leaving out a few other words which it is not necessary to read—"but so that the position of such pit or pits be subject to the reasonable approval of the said lessor, his heirs or assigns." Now, one thing is clear—that the lessor never refused his approval or gave it. On March 15, 1898, the railway company agreed that they should give Colonel Vaughan Lee a sum of 1800*l.* or 1900*l.*, I forget which, for the interest which he had—for his reversion in fee really—with regard to this property; and that being so, on May 25 the railway company gave Mr. Masters notice to treat with regard to his interest, if any, in the land which they required to take. On May 25 Mr. Masters gave Colonel Vaughan Lee, or rather his steward, notice in a letter that he did require to sink another pit within the proviso in the lease. Mr. Masters never has given to the railway company—this is where the difficulty arose in my mind to a certain extent—that notice which he probably would have had to give to the railway company if the railway company had been an ordinary purchaser in ordinary circumstances from Colonel Vaughan Lee.

On those facts the arbitrator has found, with regard to what is called interest No. 2, that is to say, this alleged interest, that 8900*l.* is awarded by him "as compensation, and such amount was calculated on the basis of compensating the said Thomas James Masters for the additional expense which would or might hereafter have to be incurred by him, because the railway company, by taking part of the land referred to in the said clause in the said lease, had made it impossible for him hereafter to sink a new pit if and when required upon the part of the land so taken." Now, as I understand the contention on the part of the railway company, it is this. In the first

place they say that the clause in the lease was a mere personal covenant, and did not create any interest in the land; and, secondly, that the railway company, having purchased Colonel Vaughan Lee's reversion in fee in this land, the lessee was bound to give to the railway company the same notice under the lease that he would have been bound to give to Colonel Vaughan Lee, and, not having done so, he cannot get anything. On the other hand it is contended that that is not so, and cannot be so, because there has been created by this demise an interest in the land attaching to it affecting the mode and value of its occupation by Mr. Masters, and therefore an interest in the land which, if injuriously affected by the railway company's taking it under their compulsory powers, must be paid for, because it gives to the person whose interest has been so injuriously affected a right to compensation under the Act of Parliament. Now, I agree with my learned brother that, although there has been no demise of the whole surface of the 335 acres, there has been a demise of something which perhaps it is difficult in language exactly to define, but which in fact is and was at the material time a right and privilege to be exercised in connection with the mines and minerals which were mentioned in the lease. If that is so, the matter is clear, and in my opinion there is nothing more to be said, because, the moment you get the interest in land created, you have as a fact the finding of the arbitrator that the interest has been injuriously affected, and he has found, or must be taken to have found, that this was a reasonable place to sink the shaft, and that if it had been a question between Colonel Vaughan Lee and Mr. Masters, Mr. Masters would have been entitled to say to Colonel Vaughan Lee, "You ought to allow me to put a pit upon that particular site." I think it is no answer by the railway company to say that because they have purchased voluntarily from Colonel Vaughan Lee, therefore the lessee is bound to give the same notice to them as he would have been bound to give to Colonel Vaughan Lee. I think that the position is this: What was the interest of Mr. Masters—the exact legal interest which existed in him at the time when the railway company gave him the notice to treat?

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It was this—that he had on the very same day given notice to his lessor, Colonel Vaughan Lee, who had not sold, but who had entered into an agreement to sell, that Mr. Masters should be entitled to put a pit upon that particular spot. That it was a reasonable place to put it, and that it was a proper place to put it, has been found in fact by the arbitrator, for I find on reading the notes that that is a question which he was asked to decide, and although he has not found it in terms, it must be taken that he has in fact found it. He has found that 8900*l.* is the compensation which ought to be paid to Mr. Masters for injuriously affecting this interest, which I find to exist in law, in consequence of the railway company having taken his land under compulsory powers. Therefore, I think that the claimant is entitled to the amount of 8900*l.* which has been awarded to him in that respect.

I should like to say that I have read carefully the cases that have been cited to us during the argument on one side and on the other. With regard to those cases which were cited on the point of covenants running with the land and so forth, I do not decide that this was a covenant running with the land in the sense in which that expression is generally used. It is an interest which passed with the reversion. It could not be destroyed by Colonel Vaughan Lee, unless he could succeed in shewing as between himself and Mr. Masters that Mr. Masters' application to him was unreasonable with regard to the site of the pit. As to the other cases, I wish to say that I do not think any of them are quite in point. No exact case has been cited to us which can be called a direct authority on the point here raised. I am astonished that that is so, because one would have thought that these questions must very often have arisen.

My decision, which I am trying to put as shortly as I can, is this: That this lease did create an interest in favour of the lessee which attached to the land demised to him with regard to the minerals, and a right with regard to the surface of such a nature that it was an interest attachable to the land which the railway company has taken. It could not be destroyed by Colonel Vaughan Lee, it cannot be destroyed by the railway

company, and they, having taken it compulsorily, must pay for the interest of Mr. Masters which they have injuriously affected in that respect.

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Judgment for the claimant.

Solicitors for claimant: *Bell, Brodrick & Gray, for Linton & Kemshole, Cardiff.*

Solicitor for railway company: *R. R. Nelson.*

W. J. B.

ST. SAVIOUR'S UNION *v.* BURBRIDGE.

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July 31.

Poor Law — Wilful Refusal or Neglect of Person to maintain himself — Incapacity resulting from Drunkenness — Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

Where a person at the time of his becoming chargeable to a union is owing to illness unable to maintain himself, the fact that that illness was the result of drunkenness does not cause his inability to amount to a wilful refusal or neglect to maintain himself within the meaning of s. 3 of the Vagrancy Act, 1824.

CASE stated by a metropolitan police magistrate.

On November 25, 1899, it came to the knowledge of the relieving officer of the guardians of the St. Saviour's Union that one Frank David Burbridge was suffering from delirium tremens, and that he was then at his own residence in a state dangerous to himself and those about him. This knowledge was conveyed to the relieving officer by the certificate of Dr. Langley, the medical attendant of the said F. D. Burbridge.

Upon the receipt of this certificate and upon the same day the relieving officer attended at the residence of the said Burbridge and removed him to the workhouse infirmary of the said St. Saviour's Union, giving an order for his admission thereto, which order described him as an alleged lunatic.

After his admission to the infirmary Burbridge was seen by the medical officer of the workhouse and was found to be suffering from delirium tremens, and thereupon an order was obtained from a justice of the peace acting under the Lunacy Acts detaining Burbridge in the workhouse.

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Burbridge was so detained in the workhouse until November 29, 1899, upon which day, the attack of delirium tremens having then passed off, he was discharged upon his own application and upon an order for his discharge being granted by the said justice. Under the circumstances above set out Burbridge became and was chargeable to the union for the said period of five days.

On January 22, 1900, Burbridge was summoned at the instance of the guardians of the union, under s. 3 of the Vagrancy Act, for that he being able wholly or in part by work to maintain himself had wilfully refused and neglected so to do, by which refusal and neglect he became chargeable to the union.

At the hearing of the summons the above facts were proved, and the following facts were either proved or admitted.

At the time of his admission to the infirmary, and for the first three days of his detention therein, Burbridge was quite unable to maintain himself, and at no time during his detention would he have been allowed to leave the workhouse except upon an order for his discharge being given by the said justice.

Burbridge was a person generally well able to maintain himself, and was as a fact well to do and in such a position that the guardians might reasonably apply to him for the cost of his maintenance, or sue him in respect thereof. No application had been made by the guardians to Burbridge to pay the cost of his said maintenance, and he had not refused to do so, and he protested before the magistrate that he should willingly have paid upon application.

The magistrate, being of opinion that the above facts did not justify the conviction of Burbridge under the said Act, dismissed the summons subject to a case for the opinion of the Court.

J. A. Johnston, for the appellant union. The magistrate ought to have convicted. A person who voluntarily puts it out of his power to maintain himself is guilty of a wilful neglect to do so. Here, the illness which rendered the man unable to maintain himself was the natural result of his own wilful conduct in drinking to excess.

No counsel appeared for the respondent.

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KENNEDY J. I think the magistrate was right. The respondent was charged under s. 3 of the Vagrancy Act, which provides that "every person being able wholly or in part to maintain himself . . . . by work or by other means and wilfully refusing or neglecting so to do, by which refusal or neglect . . . . he . . . . shall have become chargeable . . . . shall be deemed an idle and disorderly person," and be liable to be convicted accordingly.

Now, at the time he was brought to the workhouse infirmary he was suffering from delirium tremens, and was in such a condition as to be dangerous to himself and others, and it is not denied that at that time he was in fact unable to maintain himself. But it is contended that because that illness from which he was then suffering was produced by his own voluntary acts of intoxication his omission to maintain himself was a wilful neglect so to do within the meaning of the section. I cannot think that the section was intended to apply to such a case. The question under that section seems to be, whether the person was able to maintain himself at the time when he became chargeable.

DARLING J. I am of the same opinion. It is said that this man, being able to maintain himself, wilfully neglected or refused to do so. At what period did he wilfully so refuse or neglect? At the time when he was taken to the workhouse he was unable to maintain himself. But it is said that he was able to do so at the time when he gave way to the habit of intoxication which brought on the illness which incapacitated him, and that that is enough. I do not agree. I cannot help thinking that if it had been intended to bring such a case as this within the Act the Legislature would have used appropriate language for that purpose. The appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *H. C. Jones.*

J. F. C.

C. A.

1900

May 14;
June 29.

[IN THE COURT OF APPEAL.]

In re WENHAM.
Ex parte BATTAMS.

Bankruptcy — Partnership — Dissolution — Partnership Debts — Writ against Firm after Dissolution—Service on each late Partner—Judgment against late Firm—Liability of Partners after Dissolution—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 38—*Bankruptcy Notice against Firm—Notice following Judgment—Petition against one late Partner only—Receiving Order—Procedure—Irregularity—Amendment—Application of Rules of Supreme Court to Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4 *sub-s.* 2, 115, 143—*Bankruptcy Rules*, 1886, *rr.* 136, 262, 353, *and Appendix, Form* 6—*Rules of Supreme Court*, 1883, *Order* XLVIII. *a*, *rr.* 1–8.

Judgment was recovered, in default of appearance, against a late partnership firm of "W. Brothers," in an action brought against it after its dissolution, for a debt incurred during the partnership. The writ had been served on each of the late partners, J. W. and T. W. A bankruptcy notice in the usual form, and following the judgment, was then addressed to "W. Brothers" and served personally on each of the late partners. The notice not having been complied with, the judgment creditor presented a petition against J. W. alone:—

Held, by the Divisional Court (Wright and Darling JJ.), that the bankruptcy notice was good, having followed the judgment; and that as it had been served on J. W. personally, a receiving order on the petition could properly be made against him.

On appeal by J. W. to the Court of Appeal (Lord Alverstone M.R., Rigby and Collins L.JJ.):—

Held, that under Rules of the Supreme Court, Order XLVIII. *a*, the action had been properly constituted against "W. Brothers" as a firm, notwithstanding its dissolution, since the cause of action had accrued before the dissolution (Partnership Act, 1890, s. 38); and that, under the same Order, the judgment was enforceable against each of the late partners:

Held also, by Lord Alverstone M.R. and Rigby L.J. (Collins L.J. doubting), that under s. 115 of the Bankruptcy Act, 1883, bankruptcy proceedings on the judgment would lie against the firm notwithstanding its dissolution, and that therefore the bankruptcy notice, though addressed to a then non-existent firm, was sufficient to support a receiving order under rule 262 of the Bankruptcy Rules, 1886, against J. W. alone:

But *held*, by Collins L.J., that even if the bankruptcy notice was

technically defective as against J. W., yet under the circumstances the defect was one that had not caused him any "substantial injustice," and was therefore capable of amendment under s. 143.

Decision of Divisional Court affirmed.

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WENHAM, *In re.* BATTAMS, *Ex parte.*

APPEAL to the Divisional Court from an order of the registrar of the Guildford and Godalming County Court dismissing a petition for a receiving order against John Wenham.

Under a partnership deed, made in 1886, two brothers, John Wenham and Thomas Kimber Wenham, became partners as butchers at Woking under the firm name of "Wenham Brothers."

In June, 1899, an action for the dissolution of the partnership was commenced in the Chancery Division, and on November 18, 1899, judgment dissolving the partnership was given in that action.

On December 8, 1899, John Battams & Co., meat salesmen, brought an action against "Wenham Brothers," the late firm name, for 163*l.*, in respect of meat alleged to have been sold and delivered to the defendants before the dissolution of the partnership. The writ was served personally upon both John Wenham and Thomas Kimber Wenham, and on December 30, 1899, judgment, in default of appearance, was recovered against the firm for the amount claimed, with costs.

On January 8, 1900, upon the application of John Battams & Co., a bankruptcy notice, following the judgment and in the form prescribed by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 2, and Bankruptcy Rules, 1886, r. 136—being form No. 6 in the Appendix to the Rules—was issued from the county court addressed to "Wenham Brothers," and on the following day that notice was served personally upon John Wenham, and also upon Thomas Kimber Wenham, who was continuing to carry on the butcher's business under the name of "Wenham Brothers."

The judgment debt remaining unpaid, a bankruptcy petition against "John Wenham" alone was presented on January 30, 1900, by John Battams & Co. in the county court, the act of bankruptcy alleged in the petition being non-compliance with the bankruptcy notice.

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On the hearing of the petition the registrar of the county court refused to make the receiving order asked for, and dismissed the petition on the ground that it was defective in form, the bankruptcy notice being addressed to "Wenham Brothers," whereas the petition was against John Wenham.

John Battams & Co. appealed from the registrar's decision.

George Wallace (*H. C. Davenport* with him), for John Battams & Co.

F. Cooper Willis (*C. Tindale Davis* with him), for John Wenham.

WRIGHT J. In this case there was a cause of action against two brothers as members of the firm of "Wenham Brothers." After that cause of action had accrued the firm dissolved partnership. Then the creditors who had the cause of action brought their action against the firm, the writ being issued against "Wenham Brothers." If this question had arisen in the year 1881 we might have had to hold, having regard to the judgments of Lord Selborne L.C. and Cotton L.J. in *Ex parte Young, In re Young* (1), that the action could not be brought against the firm in the firm name, so as to bind John Wenham by the judgment, because the partnership had been dissolved before the issue of the writ in that action. But since then Order XLVIII. *a* (2) has been framed for the purpose of meet-

(1) (1881) 19 Ch. D. 124.

(2) Order XLVIII. *a* provides as follows:—

Rule 1: "Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action. . . ."

Rule 3: "Where persons are sued as partners in the name of their firm under rule 1, the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there; and, subject to these rules, such service shall be deemed good service upon the firm so sued, whether any of the members thereof are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary: provided that in the case of a co-partnership which has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ of summons shall be served upon every

ing the difficulty, and the changes which are effected by the rules of that order point strongly to the conclusion that it was expressly intended to alter the provisions of the former rules which dealt with the matter, and to provide a convenient procedure by enabling co-partners to be sued in the name of the firm of which they were co-partners at the time of the accruing of the cause of action, leaving the question of fact, whether a person was a partner when the cause of action accrued, to be decided in the action. So far, therefore, everything was rightly done in the present case. The next question is, Was execution, when the bankruptcy notice was served, possible against John Wenham? There, again, everything had been rightly done, because John Wenham was personally served with the writ of summons and failed to appear, and therefore came expressly within Order XLVIII. *a*, r. 8 (*c*), so that execution could be issued against him. There existed, therefore, at the commencement of the bankruptcy proceedings, everything that made it possible to take those proceedings. Next, was it possible to issue a good bankruptcy notice against the firm, the partnership having been dissolved? The bankruptcy notice followed the judgment, being addressed to the firm by the firm name. In the Bankruptcy Rules there is no express provision dealing with the case, nor is there any decision since Order XLVIII. *a* was passed. The point would be one of some difficulty but for two circumstances: first, the bankruptcy notice followed the

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person within the jurisdiction sought to be made liable."

Rule 4: "Where a writ is issued against a firm, and is served as directed by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters. In default of such notice, the person served shall be deemed to be served as a partner."

Rule 8: "Where a judgment or order is against a firm, execution may issue . . . . (*c*) against any person who has been individually served, as a partner, with the writ of summons and has failed to appear. . . . But except as against any property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who . . . . has not appeared to the writ unless he has been made a party to the action under Order XI., or has been served within the jurisdiction after the writ in the action was issued."

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form of the judgment; and, secondly, it was served upon John Wenham personally. Looking at the substance of the matter, I think we ought to hold that enough has been done here—that in such a case as the present a bankruptcy notice which follows the form of the judgment is good if it has been served upon the person sought to be affected by it. If the bankruptcy notice be good, there is no reason why a bankruptcy petition should not be presented against either of the brothers Wenham. There is, therefore, no sufficient ground for refusing to make the receiving order.

DARLING J. I am of the same opinion.

Appeal allowed. Leave to appeal.

W. A.

John Wenham appealed to the Court of Appeal from the judgment of the Divisional Court.

The appeal was heard on June 29, 1900.

F. Cooper Willis and *C. Tindale Davis*, for John Wenham. The registrar's order ought to be restored, and the bankruptcy petition dismissed. The Divisional Court relied on Order XLVIII. *a* of the Rules of the Supreme Court, 1883 (1); but bankruptcy proceedings are not governed by those rules at all: Bankruptcy Rules, 1886, r. 353. Bankruptcy has a code of its own, contained in the Bankruptcy Act, 1883, and the rules thereunder. It is, therefore, necessary to bring to the consideration of this case that code alone, and the rules regulating procedure in the High Court must not be imported into it: *In re Gyll* (2); *Ex parte Hillman, In re Pumfrey* (3); *Ex parte Reynolds, In re Barnett* (4); *In re Clagett, Ex parte Charman.* (5) It is submitted that the rule in bankruptcy laid down by Lord Selborne in *Ex parte Young, In re Young* (6), still applies, namely, that a judgment against a

(1) See ante, note (2), pp. 700, 701.
(2) (1888) 5 Morell, 272.
(3) (1879) 10 Ch. D. 622, 625.
(4) (1885) 15 Q. B. D. 169, 186.
(5) (1887) 4 Times L. R. 18.
(6) 19 Ch. D. 124, 132.

firm is not sufficient to constitute a debt capable of supporting a bankruptcy petition against an individual member of the firm not named on the record. Under s. 115 of the Bankruptcy Act, 1883 (1), proceedings under the Act can only be taken against persons "being partners," that is, being partners at the time the proceedings are commenced. Here John Wenham was not a partner at the date of the receiving order, and, therefore, could not be made a bankrupt. And under rule 262 of the Bankruptcy Rules, 1886 (2), the receiving order could operate only against persons who were partners at the time, and, therefore, could have no effect as against John Wenham. Again, the bankruptcy notice served on John Wenham was a notice addressed to "Wenham Brothers," a non-existent firm; it was therefore defective, and calculated to perplex and mislead: *In re Howes, Ex parte Hughes.* (3) Bankruptcy being a quasi-criminal act, it is important that the rules as to the issuing of a bankruptcy notice should in all cases be strictly complied with: *In re Collier, Ex parte Dan Rylands, Limited.* (4)

George Wallace and *H. C. Davenport*, for Battams & Co. The proceedings have been perfectly regular. The writ was served on each partner under Order XLVIII. *a*, rr. 3, 4. Then in the bankruptcy notice the judgment creditors followed the terms of the judgment, as required by Bankruptcy Rule 136 and Appendix, Form 6. They served the notice on each person who had been a member of the firm, which again was the right course, and as John Wenham, one of the late members so served, failed to pay the debt, he committed an act of bankruptcy, under s. 4, sub-s. 1 (*g*), upon which the

(1) Sect. 115 of the Bankruptcy Act, 1883, is as follows: "Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings, or be proceeded against under this Act in the name of the firm, but in such case the Court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath, or otherwise as the Court may direct."

(2) Rule 262 is as follows: "A receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner in that firm."

(3) [1892] 2 Q. B. 628.

(4) (1891) 8 Morell, 80.

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judgment creditors were entitled to present a petition against him: s. 110.

With regard to s. 115, the contention on behalf of the appellant cannot be supported. A dissolution of partnership does not enable the late partners to escape being sued for obligations incurred by them while partners. It is expressly enacted by s. 38 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), that after the dissolution of a partnership the rights and obligations of the partners shall continue, notwithstanding the dissolution, so far as may be necessary for winding up the affairs of the partnership. That section merely reduced into the form of a legislative enactment the result of the long-established decisions on the subject, which are collected in Lindley on Partnership, 6th ed. p. 226, note (*p*). It follows therefore that in the present case the old partnership liability continues until the partnership affairs have been wound up. Should there be any defect in the bankruptcy notice, it is purely formal and causes no injustice, and the Court can rectify it under s. 143, sub-s. 1 (1): *In re Bates, Ex parte Lindsey* (2); *Lovell & Christmas* v. *Beauchamp*. (3)

F. Cooper Willis, in reply.

LORD ALVERSTONE M.R. Upon the first point in this case, namely, as to whether or not there was a good judgment against John Wenham, there really is no doubt. Rules 1, 3, and 4 of Order XLVIII. *a* establish, to my mind, perfectly clearly that where service has been effected upon a partner and judgment obtained after such service, or where the partner has appeared, the judgment is one which can be enforced against the partner personally.

Then there remains what perhaps is the more important point—whether or not there was such a defect in the bank-

(1) Sect. 143, sub-s. 1, is as follows: "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that Court."

(2) (1887) 4 Morell, 192.

(3) [1894] A. C. 607.

ruptcy notice founded on the judgment as to invalidate the bankruptcy proceedings. The facts are shortly these. The firm was dissolved on November 18, 1899; the writ was issued on December 8 against the firm, but in respect of goods which, on the face of the writ and for the purpose of the judgment, may be taken to have been supplied before the partnership was dissolved. I feel no doubt myself that those proceedings were strictly in order and in accordance with the true intent and meaning of s. 115 of the Bankruptcy Act, 1883. That section provides that "Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings, or be proceeded against under this Act in the name of the firm." I think the words "being partners" are intended to mean "who have carried on business in partnership for the purpose of the liability which is sought to be enforced." In my opinion dissolution does not enable partners to get rid of the liability to have proceedings taken against them under s. 115 for the purpose of enforcing payment of a partnership debt. I think the true meaning of the 115th section is, that if persons have been partners in a business, then bankruptcy proceedings can be taken against them in the partnership name.

It is said that cannot be the meaning of the section because rule 262 provides that "a receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner in that firm." Rule 262 is an enabling rule, enabling a creditor to get a separate receiving order against each individual partner, and that it cannot be held to cut down the rights and liabilities which are created by s. 115. Therefore, so far as the bankruptcy proceedings are concerned, I think there was no objection to the bankruptcy notice being addressed to "Wenham Brothers," although as a matter of fact at the time when the notice was issued "Wenham Brothers" was no longer a partnership. It does not matter for this purpose whether the creditor knew of the dissolution or not, but it would be a strange thing if a secret dissolution could put an end to the right of the partnership creditor. The claim in the

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action was in respect of a liability incurred by the members of the firm while they were partners.

It remains to consider sub-s. 1 (*g*) of s. 4 of the Act, under which the debtor must, in order to avoid committing an act of bankruptcy, comply, within a limited time, with the requirements of the creditor's bankruptcy notice. It is true there has been a practice that the notice shall follow the judgment, but I think the terms of rule 136 have not been sufficiently borne in mind, which provide that "a bankruptcy notice shall be in the form of No. 6 in the Appendix, with such variations as circumstances may require." Turning to Form No. 6, we find that the notice may be addressed to "A. B." or "A., B. & Co.," and shall state that the judgment has been obtained, and the amount due under it. I see no reason why it should not be indicated if necessary on the face of the bankruptcy notice that it is directed to the members of the firm by their individual names, although the body of it must follow the judgment. I should think that would be such a variation as is contemplated by the rules. It is quite clear there is no substance in the objection, because the judgment in the bankruptcy notice was a judgment which had been in fact obtained, and it is a judgment which, as I have already said, can be enforced against John Wenham. The only point suggested as being misleading is that the notice is addressed and sent to "Wenham Brothers." It was served personally upon each of the late partners; and, unless the view I take of the 115th section is right, Mr. Cooper Willis is driven to contend that there ought to have been separate proceedings on a separate notice, possibly involving a separate action and judgment, and that no person having properly obtained the judgment against Wenham Brothers, although it was binding against individual partners, could issue a bankruptcy notice addressed to each individual. He says, in effect, you must follow the judgment, and yet you must not make it clear that the judgment is going to be enforced against the individual partners. I also think that, under the circumstances of the case, if there was a defect it was one which could have been cured by amendment under s. 143. There was a liability on

the part of John Wenham to satisfy this judgment, and he was personally served with the bankruptcy notice founded upon it. He was told that the notice was in respect of a debt incurred while he was a partner in Wenham Brothers, and, in my opinion, there is no ground for saying, in the language of s. 143, that any "substantial injustice has been caused by the defect or irregularity" in the notice; but I see no reason why the address should not be amended, if desired. There is no substance in the technical objection raised, and I think that the judgment of the Divisional Court should be sustained, and this appeal dismissed with costs.

RIGBY L.J. From the first I have been unable to see what ground of complaint John Wenham could possibly have under the circumstances of this case, treating his ground of complaint as being the difficulty, perplexity, or trouble he might be brought into. Though there have been general suggestions of difficulty, I have not heard any particular difficulty defined in a manner that I can understand. True it is that, though there is no solid ground of complaint here, it would be sufficient, in certain circumstances, to shew that the provisions of the Bankruptcy Act and the rules under it had not been complied with. Technically such an objection may, perhaps, be open to John Wenham; but how are we to treat it, having regard to the circumstances of this case? Persons who carry on business under a firm name hold out, in effect, to those persons with whom they do business, "You can have your rights against us enforced on the basis that we are a firm"; and it has been held in many cases that partners are not at liberty by a dissolution effectually to alter that state of things.

I need only refer to Order XLVIII. *a*, which does not appear to lay down anything new, but to recognise effectually what was well-known law before—that people cannot alter in substance their relations to their creditors on the ground that they have dissolved partnership. That is a general principle of law as I understand it. Order XLVIII. *a* is no doubt a particular application of it for the purposes of the High Court, and I should go with Mr. Cooper Willis so far as to say that, quâ order, it cannot

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be introduced into bankruptcy: it was not intended for that purpose. Bankruptcy has its own rules of procedure; but the rule which is the foundation, and I may say in a sense the justification of Order XLVIII. *a*, is a rule of equity—at any rate, a rule of general law: the Rules of the Supreme Court are rules both of law and of equity, and are perpetually dealt with in bankruptcy, though not repeated in the Bankruptcy Acts or any of the rules under them. Then, that being so, the judgment against Wenham Brothers operated, under the circumstances, to charge John Wenham separately. Why there should not be a bankruptcy notice founded on that judgment I am unable to see. For my part I think Mr. Cooper Willis is right in saying that you must follow the judgment. It would not be wise or perhaps even permissible to vary so much from the judgment as to include in the notice the individual names of the members; but I think it was right to issue a notice to Wenham Brothers, and to call upon Wenham Brothers to defend that notice in such a way as is pointed out by the form of notice itself, and by the decisions upon it. I am unable myself to see that there is any technical difficulty when the matter is thoroughly considered; and, therefore, I am constrained to say that, in my opinion, the judgment of the Court below is quite right, and that this appeal fails.

COLLINS L.J. I cannot say that I feel so clear upon the question of the technical difficulty as my learned brothers do in this case. It seems to me there is a primâ facie technical difficulty, though I think it is one which comes within the amending section of the Act, s. 143; and I think that obviously no sort of injustice would be done to John Wenham, either at law or in equity, if that amending section were applied. The rules as to suing partners are no doubt recognised by the law which governs these courts; and, in my opinion, there was a perfectly good judgment obtained under the Rules of the Supreme Court against John Wenham and his brother, they having been members of the firm which was dissolved. But then, when we come to the bankruptcy proceedings, we get into a new code. We leave the old one behind us, and we take

up that which the statute has prescribed. We find the bankruptcy statute is dealing with the case of a creditor desiring to make a firm of partners bankrupt. By that statute the Legislature has provided certain machinery for so doing, and without that machinery the purpose cannot be accomplished in bankruptcy; it must be carried out under the machinery of the Bankruptcy Act alone. It seems to me that, whether by oversight or not, s. 115 only contemplates proceedings by or against persons who are partners at the time of the proceedings. It says that "Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings, or be proceeded against under this Act in the name of the firm, but in such case the Court may on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath, or otherwise as the Court may direct"; and then the subsequent proceedings, such as the receiving order, and so forth, are to be a natural sequence of the bankruptcy proceedings commenced under the Act against the firm. Then rule 262 under the Act says that the receiving order shall operate as if made against each of the persons who at the date of the order is a partner in that firm. That rule contemplates proceedings only against persons who are partners at the time. It is only by putting some slight strain on the words of the section that you can construe it to mean persons who were partners at one time, but who are not at the time the proceedings were taken. But whether that is the meaning or not, I think this is obviously a case in which the Court should exercise the power of amendment, if it has that power; and it seems to me that the 143rd section amply covers this particular case. Therefore, for these reasons I agree with my learned brothers that the decision of the Divisional Court must be affirmed with costs.

Appeal dismissed.

Solicitors: *Mann & Crimp; H. J. V. Philpott.*

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May 1, 8; *July* 20, 31.

[IN THE COURT OF APPEAL.]

In re HARRISON & INGRAM. *Ex parte* WHINNEY.

Bankruptcy — Life Policy — Post-nuptial Settlement — Covenant to keep up Policy, Absence of — Premiums — Voluntary Payment by Settlor — Bankruptcy of Settlor — Policy Moneys — Proportion not represented by each Premium — Voluntary Settlement — Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 47.

The payment of a premium on a life policy is not to be regarded as securing a certain part of the money assured by the policy. The whole of the premiums are paid to keep up the policy, and no proportionate part of the money payable under it is represented by the payment of any particular premium.

Consequently, where the owner of a policy on his life by a post-nuptial settlement in 1877 assigned it to trustees for his wife and children, and he himself continued to pay the premiums voluntarily, being under no covenant with the trustees to do so, and in 1899 became bankrupt and died:—

Held, by the Court of Appeal, reversing Wright J., that no part of the payments of premiums during the ten years preceding the bankruptcy was a "settlement" within s. 47 of the Bankruptcy Act, 1883, so as to entitle the trustee in bankruptcy to any proportionate part of the policy moneys.

Prior to 1877 Cartmell Harrison had insured his life by four policies of assurance for sums amounting in the aggregate to 9000*l*. By a post-nuptial settlement, dated April 5, 1877, he assigned the policies and all moneys payable thereunder to trustees upon trust to invest the proceeds and pay the income to his wife for life or widowhood, and after her death or second marriage to hold the capital in trust for such of his children as he should by deed or will appoint, and in default of appointment, for his children at twenty-one or marriage in equal shares.

The settlement contained the usual hotchpot clause, and also a proviso that the settlor might appropriate for his own absolute use and benefit any bonuses on the policies, or might direct them to be applied either in reduction of the

premiums or in augmentation of the principal moneys assured. But the settlement did not contain any covenant on the part of the settlor to keep up the policies or to pay the premiums.

Mr. Harrison had two children, and previously to and in consideration of the marriage of one of them, a daughter, with a Mr. Barker, which took place on July 17, 1895, he, Mr. Harrison, by deed, dated the previous day, after reciting the policies and that on the treaty for the intended marriage it was agreed that he should make the appointment and assignment thereinafter contained, appointed and assigned three-fifths of the policy moneys, inclusive of present and future bonuses (except such bonuses as had already been appropriated by him), and of the investments for the time being representing the same, to his daughter absolutely, subject only to the interest therein of his wife during widowhood.

On the marriage a settlement was executed, by which Mr. Barker, in pursuance of an agreement, and on the faith of the appointment to Miss Harrison, settled certain property of his own upon the usual trusts. The settlement did not, however, include the property appointed to Miss Harrison, but her father thereby covenanted for payment to the trustees of an annuity during the lives of the wife and husband and the life of the survivor.

On November 25, 1899, a receiving order was made against Mr. Harrison, and two days later, on November 27, he died. All the premiums on the policies up to his death were paid by him, except one, which was paid in November, 1899, by the trustees of the settlement of 1877, and one other in respect of which the days of grace were still running at the date of his death, and which was deducted from the amount paid over to the surviving trustee of that settlement by the insurance company. Mr. Harrison had been insolvent, it appeared, since 1889. The total amount received by the surviving trustee in respect of the policies was 10,919*l.* 11*s.* The total amount of premiums paid was 4686*l.* The trustee in the bankruptcy contended that the settlement of 1877 was a voluntary settlement, and that under s. 47 of the Bankruptcy Act, 1883

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(46 & 47 Vict. c. 52) (1), he was entitled to so much of the policy moneys as represented the premiums paid by Mr. Harrison within ten years preceding the date of his death. He accordingly now moved for a declaration that the payments made by the bankrupt in respect of the premiums on the policies since November 27, 1889, that is, during the ten years prior to the death, were "settlements" of the property of the bankrupt within the meaning of s. 47 of the Act, and void against the trustee in bankruptcy, and that the surviving trustee of the settlement of 1877 might be ordered to pay to the applicant such proportion of the policy moneys as was attributable to the premiums so paid.

Muir Mackenzie and *Whinney*, for the trustee in bankruptcy.

Reed, Q.C., and *O. L. Clare*, for the surviving trustee of the settlement of 1877.

Cur. adv. vult.

May 8. WRIGHT J., after stating the facts, said:—The question is whether, for the purposes of s. 47 of the Bankruptcy Act, 1883, the payments by Cartmell Harrison of the premiums on the settled policies during the ten years before his bankruptcy ought to be regarded as voluntary settlements, either of the premiums paid, or of so much of the value of the policies as those payments may be supposed to have produced.

(1) Sect. 47 of the Bankruptcy Act, 1883, provides (sub-s. 1) that "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof." Sub-sect. 3 provides that "'settlement' shall for the purposes of this section include any conveyance or transfer of property."

The contentions of the respondent, as I understand them, are that the only settlement was the original settlement made in 1877, more than ten years before the bankruptcy; that the annual payments of the premiums did not increase the sum which was to become payable on the death, and which was the subject of the settlement, but were merely performances of the condition on which the continuance of the liability of the insurance company depended; and that even if the payment of the premiums in any year can be regarded as a settlement at all, it was a settlement only of the amount of the premiums themselves, and not of any part of the value of the policies. It seems, however, to be plain that the payment of the premiums is part of the consideration for the insurance (see *Dalby* v. *India and London Life Assurance Co.* (1)), and the payment of each part of the consideration is pro tanto a purchase of the right to the amount insured, and, being paid for the purpose of acquiring or securing the settled fund and so converted into a portion of the settled fund, seems to be a fresh settlement from time to time as the payments were made. The payment of the premium transfers the money from the settlor as the consideration for the settled fund continuing to exist. I cannot see any difference in this respect between payment of the premium on an old policy and the payment of a premium on a new policy. In either case the payment of the premium upon a settled policy seems to be, in effect, either a settlement of the premium paid, or a settlement of what is produced by the payment of it; and the only remaining question is which of these two settlements it shall be considered to be. It seems to me that the thing which is settled is not the premium paid, but the fund or result which is produced by it, and that the section undoes, in favour of the trustee in bankruptcy, not the payment of the premium, but the alienation from the settlor's estate of whatever it is that by paying the premium for the purposes of the settlement he has assured to the voluntary cestui que trust, and that is, not the amount of the premium, but the benefit resulting from the payment of it. The case seems to me to be

(1) (1854) 15 C. B. 365.

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the same in substance as if the money paid as premium had been invested in buying the reversion of an estate for the benefit of a volunteer. In that case the trustee in the settlor's bankruptcy would, I suppose, take, not the price at which the reversion was bought, but the reversion, which may be much more valuable than the price paid for it, but which, and not the price paid, is in the case supposed the property which, at the time of the accrual of the trustee's title, is vested in the volunteer by virtue of the settlement, and but for the settlement would have been vested in the bankrupt. This it is which the section gives back to the bankrupt, and through him to his trustee in bankruptcy. It is admitted by the trustee in bankruptcy that so much of the value of the policies as represents three-fifths of the premiums paid before 1895 must be regarded as settled in 1895 for valuable consideration. There must be a declaration that the trustee in the bankruptcy is entitled to so much of the value of the policies as represents the premiums paid during the ten years before the bankruptcy, after deduction of so much of that value as represents premiums paid between the commencement of the ten years and the appointment in 1895. If the amounts cannot be agreed, there must be an inquiry.

[By the order, as drawn up, it was declared that the applicant, the trustee in bankruptcy, was entitled to payment out of the policy moneys of an amount bearing the same proportion to the total policy moneys as the premiums paid by the bankrupt within the last ten years, less three-fifths of the premiums paid between November 17, 1889 (the commencement of the ten years before the bankruptcy), and July 17, 1895 (the date of the marriage of the daughter), bore to the total premiums: and, the applicant and the respondent (the surviving trustee of the settlement of 1877) agreeing that the total sum received by the latter in respect of the policies was 10,919*l.* 11*s.*, and that the amount payable thereout to the applicant upon the footing of the foregoing declaration was 2125*l.* 6*s.* 3*d.*, it was ordered that the respondent should pay to the applicant that sum out of

the 10,919*l.* 11*s.*, and should retain the balance, 8794*l.* 4*s.* 9*d.*, as trustee of the settlement of 1877.]

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From that order the trustee of the settlement of 1877 appealed.

The appeal was heard on July 20, 1900.

Reed, Q.C., and *O. L. Clare*, for the trustee of the settlement of 1877. The learned judge was wrong in holding that the premiums for each year were attributable pro ratâ to the policy moneys. The principle on which the order proceeded is erroneous, for a premium when paid cannot be treated as a purchase from time to time of a proportionate part of the policy moneys. Nor ought the payments of the premiums by the settlor during the ten years before his bankruptcy to be treated as voluntary settlements; for, as the appointment on the marriage of the daughter in 1895 recited that the policies were existing and that it had been agreed that three-fifths of the policy moneys should be settled, that was sufficient to validate, for the consideration subsequently given, all the payments of premiums prior to that date: *George* v. *Milbanke*. (1) Three cases were cited in the Court below on behalf of the trustee in bankruptcy: *Holt* v. *Everall* (2), *Stokoe* v. *Cowan* (3), and *Falcke* v. *Scottish Imperial Insurance Co.* (4); but they have no real application to the present case. *Dalby* v. *India and London Life Assurance Co.* (5), cited by the learned judge, merely decides that a contract of life assurance is nothing more than a contract to pay a certain sum of money after the death of a person in consideration of the due payment of the annual premiums during his life, and that it is not a contract of indemnity. Before the trustee in bankruptcy can take any part of this money, the Court must declare the settlement of 1877 void, so that the money which then became the property of the trustees may revert to the settlor and thus pass to his

(1) (1803) 9 Ves. 190.
(2) (1876) 2 Ch. D. 266.
(3) (1861) 29 Beav. 637.
(4) (1886) 34 Ch. D. 234, 244.
(5) 15 C. B. 365.

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trustee in bankruptcy: *In re Farnham.* (1) A policy of insurance is not, as the learned judge has treated it, a new contract made every year, but a contract made once for all, with a condition to be performed de anno in annum, and if that condition is not performed in any year, the contract is at an end: *In re Anchor Assurance Co.* (2) Sect. 47 of the Bankruptcy Act, 1883, only does what the old law did, that is, it removes the impediment in the way of the trustee in bankruptcy, and enables him to sell or dispose of the property voluntarily parted with by the bankrupt: it does no more than that. Here the moneys representing the premiums were parted with voluntarily and without request, and, therefore, were not "settlement" moneys at all. The performance of the condition of the policy in no way increased the original contract, nor did it give the owner of the policy any increased right. It is impossible to treat the payment of a premium as equivalent to the purchase of a reversion, as the learned judge has done. Payments of premiums cannot be treated as "settlements," for the money when paid is gone and is never intended to be preserved for the benefit of the donee: *In re Plummer.* (3) A voluntary payment cannot be got back by means of the Bankruptcy Act; otherwise a father could never give a sum of money to a child or other person on marriage, or to put into a partnership. The Act does not apply to a transaction of that sort. Suppose the payments in the present case had been made, not by Harrison, but by some one else at the request of the trustees, to prevent the policy lapsing, and then that person became bankrupt, it could not be contended that the money so paid could ever be got back. The Act is not intended to catch voluntary payments which disappear once for all: it only applies to money kept in hand; otherwise it would reach sums paid by a parent to set up a son in business or in sending him to a school or university.

Levett, Q.C., Muir Mackenzie, and *Whinney*, for the trustee in bankruptcy. It may be admitted that a sum of money once for all paid away by a man to a creditor or a son cannot, in

(1) [1895] 2 Ch. 799, 808. (2) (1870) 5 Ch. 632, at p. 638.
(3) Post, p. 790.

the event of his bankruptcy, be recovered; but that does not apply to payments of premiums on a policy. The question is, What does the money so paid buy? The ultimate value of the thing purchased does not affect the question. What is settled here is a sum of money bought year by year from the insurance company. Accordingly, as the policy moneys are the product of voluntary payments by the bankrupt from year to year within the ten years, that enables the trustee in bankruptcy to take the whole. What the settlor bought when he effected each policy was a sum payable at his death; what was settled when the settlement of 1877 was made was nothing but the surrender value; and what was settled at the end of each subsequent year through payment of the premium was the surrender value—not the whole sum, because there was no obligation to pay the premiums. Every year there is a new covenant.

[RIGBY L.J. No; a new payment.]

The insurance company says in effect, "At the end of the year we will enter into a new contract with you." Now, at the beginning of the ten years before the bankruptcy what was it that was settled? Again, the surrender value; and the effect of each payment of premium by the bankrupt during the ten years was the purchase of an increment of the surrender value.

The decision of the learned judge below is in accordance with the principles laid down in *In re Tankard* (1) and *French* v. *French*. (2) It is not necessary to confine s. 47 of the Act to the narrow construction that to render a payment void the donor must have paid direct to the donee: if the money is paid by the donor to purchase the thing the donee is to get, that is enough. The payments of the premiums during the ten years ought to be refunded as being voluntary settlements either of the premiums paid, or of so much of the value of the policy as those payments may be considered to have produced. Each payment of premium was part of the consideration for the insurance, and the payment of each part of the consideration

(1) [1899] 2 Q. B. 57, 59. (2) (1855) 6 D. M. & G. 95.

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was pro tanto a purchase of the right to the amount assured, and was a fresh settlement from time to time as the payments were made; and that is a transaction covered by s. 47.

O. L. Clare, in reply.

Cur. adv. vult.

July 31. The judgment of the Court (Lord Alverstone M.R., Rigby and Collins L.JJ.) was delivered by

LORD ALVERSTONE M.R. After stating the facts, his Lordship continued:—The case is by no means free from difficulty. A case may easily arise in which money paid to effect a policy within ten years of the date of bankruptcy, which policy has been taken out and settled within that period, might be held to be a settlement within the 47th section. On the other hand, we think it is clear from decided cases that if money paid by the bankrupt was, in fact, only money advanced to enable the premiums to be paid it would not of necessity constitute a settlement solely on the ground that the payment had been made within the ten years. The question in this case is within which category these payments fall. We are of opinion that no part of the payments can be regarded as being settlements within the 47th section. The policies were settled as far back as 1877, they having already been in existence for some years, and the payments made by the bankrupt were payments made to the insurance company to prevent the lapsing of the policies. The view taken by the learned judge seems to have been that each payment of premium secured a certain part of the money assured by the policies. We cannot take this view. The whole of the premiums were paid to keep up the policies, and no proportionate part of the moneys payable under the policies is represented by the payment of any particular premium. Nor do we think the actual amounts paid for premiums can be regarded as "settlements" within the meaning of the 47th section. The amounts so paid were not intended to be earmarked or kept separate, nor, as we have said, can they now be said to be represented by any specific amount. We think the amounts must be treated either as moneys paid by the

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bankrupt to keep up the policies as between himself and the insurance company, or as moneys paid to enable the trustees to keep the policies alive.

For this reason we are of opinion that the trustee of the bankrupt is not entitled to any part of the moneys paid by the insurance company, and that this appeal should be allowed.

Appeal allowed.

Solicitors: *W. H. T. T. Powell; Black & Moss.*

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[IN THE COURT OF APPEAL.]

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FURBER *v.* TAYLOR.

County Court—Order for Payment of Costs—Action not Maintainable on County Court Order.

An action is not maintainable upon an order of a county court for payment of costs.

APPEAL from an order made by Lawrance J. at chambers on proceedings under Order XIV. giving leave to defend the action.

The action was brought upon an order made in a county court for costs on the trial of an interpleader issue as after mentioned.

The plaintiff had claimed, as grantee under a bill of sale, goods taken in execution on a judgment in favour of the defendant. The sheriff interpleaded, and an order was made at chambers for the trial of an interpleader issue between the plaintiff and the defendant to determine whose property the goods were. The issue was remitted to the Bloomsbury County Court for trial. At the trial the plaintiff succeeded, and an order was made against the defendant to pay a certain sum for costs to the registrar of the court for the use of the plaintiff. The defendant did not pay the sum so ordered to be paid, and the plaintiff, being unable to obtain satisfaction of it

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by execution, brought an action in the High Court upon the order of the county court for the amount thereby ordered to be paid. The plaintiff applied at chambers for summary judgment in the action under Order XIV., but Lawrance J. gave the defendant unconditional leave to defend.

Kisch, for the plaintiff. The only question in the case is whether an action will lie upon an order of the county court for payment of costs. The general rule is that a decree or order for payment of money made by a court of competent jurisdiction creates an obligation to pay on which an action will lie. It was no doubt held in *Berkeley* v. *Elderkin* (1) that an action would not lie upon a judgment of a county court; but the judgment in *Austin* v. *Mills* (2) seems to indicate some doubt as to the correctness of the decision in *Berkeley* v. *Elderkin* (1), which is not binding on this Court. It is submitted that on general principles an action will lie upon a final order for payment of costs in a county court such as the order in this case. By Order LII. of the County Court Rules, 1889, "order" means (inter alia) the final decision of the Court in any matter; and by the County Courts Act, 1888, s. 186, "matter" means any proceeding in the county court which may be commenced as prescribed otherwise than by plaint. [He also cited *In re Boyd* (3); *Reg.* v. *County Court Judge of Essex*. (4)]

[A. L. SMITH L.J. referred to *Godfrey* v. *George* (5) and *Pritchett* v. *English and Colonial Syndicate*. (6)]

Abinger, for the defendant, was not called upon.

A. L. SMITH L.J. I think the order of the learned judge was quite right. The question is whether an action can be brought upon the order of the county court for the payment of costs by the defendant. Prior to the Judicature Acts and the making of Order XLII., r. 24, it was clear law that an action would not lie upon an order of a superior court as distinguished

(1) (1853) 1 E. & B. 805.
(2) (1853) 9 Ex. 288.
(3) [1895] 1 Q. B. 611.
(4) (1887) 18 Q. B. D. 638, 704.
(5) [1896] 1 Q. B. 48.
(6) [1899] 2 Q. B. 428.

from a judgment, the reason being that the person in whose favour the order was made could proceed by way of application to the Court which made the order, and that to allow actions to be brought on such orders would tend to multiply actions unnecessarily. There is really no need to refer to authorities to shew that this was so. It was held in *Godfrey* v. *George* (1) and *Pritchett* v. *English and Colonial Syndicate* (2) that the effect of Order XLII., r. 24, was that, by virtue of that rule, an action is now maintainable upon a judge's order. In my opinion it is clear that the same rule as was applicable to an order of a superior court before the Judicature Acts applied to an order of the county court. The plaintiff's counsel was unable to refer to any authority which shews that there was any distinction between them for this purpose. The decision in *Godfrey* v. *George* (1) does not help the plaintiff, for there is no enactment or county court rule which has with regard to orders of a county court an effect similar to that which Order XLII., r. 24, has with regard to orders of the High Court. Therefore the law with regard to an order of the county court remains the same as it was with regard to an order of the superior court before Order XLII., r. 24, and an action cannot be maintained upon such an order. For these reasons I think the appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I agree. It was not, and could not be, disputed by the plaintiff's counsel that prior to the Judicature Acts an action could not be brought upon an order of a superior court for the payment of costs, as distinguished from a judgment, either in the court which made the order or in any other court. The plaintiff's counsel must therefore suggest that, though that might have been the rule with regard to an order of a superior court, it was not the rule with regard to an order of a county court. The reasoning of the argument of Serjeant Clayton in *Emerson* v. *Lashley* (3) appears to apply just as much to an order for payment of costs in the county court as to an order of one of the old superior courts; moreover,

(1) [1896] 1 Q. B. 48. (2) [1899] 2 Q. B. 428.
(3) (1793) 2 H. Bl. 248, 251.

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Vaughan Williams L.J.

the actual decision in that case was that no action would lie to recover costs ordered to be paid by a rule of an inferior court in the course of a suit there; so that the case is a positive decision that before the County Court Acts, though an action lay upon a judgment of an inferior court, no action would have lain upon an order of the old county court.

Appeal dismissed.

Solicitor for plaintiff: *Richard Furber.*
Solicitor for defendant: *J. W. Browne.*

E. L.

1900
July 21;
Aug. 4.

WARREN AND OTHERS *v.* BROWN.

Light—Prescription—Use of Premises for Purposes requiring special Quantity of Light—Measured Right.

The plaintiffs' windows had for twenty years received an extraordinary amount of light; but although during the whole of that period the premises were suitable for the purposes of a business requiring an extraordinary amount of light, they had in fact been used for those purposes during only a portion of the period. The defendant, by the erection of a building, materially diminished the amount of light passing through the windows, but left sufficient for all ordinary purposes:—

Held, that the plaintiff had no cause of action.

Quære, whether it would have made any difference if the premises had been used during the whole of the statutory period for purposes requiring an extraordinary amount of light.

FURTHER CONSIDERATION before Wright J.

The plaintiffs, Emily Warren and William Warren, were the owners of a factory situate in the borough of Leicester, and the other plaintiff, Arthur Baum, was the lessee and occupier of the factory, in which he carried on the business of a hosiery manufacturer. In the plaintiffs' factory, which was built in 1860, there were windows which had down to the time of the obstruction complained of enjoyed the access of light in greater quantity than was necessary for ordinary purposes.

From 1860 to 1884 the factory was used as a boot and shoe factory—a purpose which required only an ordinary amount of

light. From 1884 downwards it was, with a few short intervals, used for the purpose of the manufacture of hosiery. That manufacture required an unusual degree of light, especially during the time next before the obstruction complained of owing to improvements in the kind of machinery employed. In 1899 the defendant erected a building which diminished the plaintiffs' light, but still allowed the passage through the windows of enough light for all ordinary purposes. The plaintiffs claimed an injunction and damages. The action came on for hearing at the Leicester Summer Assizes before Wright J. without a jury, when the judge reserved the case for further consideration.

Hugo Young, Q.C., and *W. H. Stevenson*, for the plaintiffs. The owner of ancient windows is entitled to so much of the light that has been used to pass through the windows during the statutory period as is necessary for the business which is carried on there, or for any business which is likely to be carried on there. In *Dent* v. *Auction Mart Co.* (1) Page Wood V.-C., while doubting whether the proposition of Lord Cranworth in an earlier case, that the right is "an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used," is not too wide, thought that it might well be supported if taken to apply "to the user of a house as it stands for any purpose for which it may be used in that condition." Here the judge finds that during the whole twenty years the factory was in its then condition suitable for the hosiery trade. In *Lanfranchi* v. *Mackenzie* (2) Malins V.-C., indeed, held that a right cannot be acquired to the access of an extraordinary amount of light necessary for a particular business unless that extraordinary amount has been used during the whole twenty years; but that decision was based upon *Martin* v. *Goble* (3), which case has since been overruled in *Moore* v. *Hall.* (4) In *Kelk* v. *Pearson* (5) James L.J. held that the owner of ancient windows was entitled to a different

(1) (1866) L. R. 2 Eq. 238, at p. 250.
(2) (1867) L. R. 4 Eq. 421.
(3) (1808) 1 Camp. 320.
(4) (1878) 3 Q. B. D. 178.
(5) (1871) L. R. 6 Ch. 809.

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amount of light according to the purpose for which the building was suitable to be used—that the right varied, for instance, according as the building was a dwelling-house, a warehouse, or a shop; and in *City of London Brewery Co.* v. *Tennant* (1) he repeated the same proposition, with which Lord Selborne also agreed. In *Aynsley* v. *Glover* (2) Jessel M.R. was of opinion that the actual use to which the dominant tenement was put was not the test. And in that view Cockburn C.J. and Mellor J. in *Moore* v. *Hall* (3) concurred, holding that in an action for obstruction of ancient lights the question was whether there had been a sensible diminution of light, so as to make the premises less available for the purposes to which they then were or might thereafter be applied. In *Corbett* v. *Jonas* (4) it was held that, where an owner grants land with a house on it which is to be used for business purposes, the presumed intention of the parties is that the house is to be granted with sufficient light for all ordinary purposes of business in the locality; and here the hosiery trade is one of the staple businesses of the town of Leicester.

[They also referred to *Leech* v. *Schweder* (5), *Clifford* v. *Holt* (6), and *Birmingham, Dudley and District Banking Co.* v. *Ross.* (7)]

Stanger, Q.C., and *A. Neilson*, for the defendant. The owner of ancient lights is entitled to so much light as is necessary for the ordinary purposes of life, and to no more. The cases of *Kelk* v. *Pearson* (8) and *City of London Brewery Co.* v. *Tennant* (1) support that view. In *Dickinson* v. *Harbottle* (9) Malins V.-C., following his decision in *Lanfranchi* v. *Mackenzie* (10), held that the plaintiff must shew a material diminution in the quantity of light and air required for the ordinary purposes of the room, and that a user of the room by the plaintiff for a special purpose for less than twenty years gave him no right to any greater quantity. The case of *Corbett* v. *Jonas* (4) is not in point. That was a question of derogation from an

(1) (1873) L. R. 9 Ch. 212.
(2) (1874) L. R. 18 Eq. 544.
(3) 3 Q. B. D. 178.
(4) [1892] 3 Ch. 137.
(5) (1874) L. R. 9 Ch. 463.
(6) [1899] 1 Ch. 698.
(7) (1888) 38 Ch. D. 295, 314.
(8) L. R. 6 Ch. 809.
(9) (1873) 28 L. T. (N.S.) 186.
(10) L. R. 4 Eq. 421.

implied grant; and the right to light acquired by grant and that acquired by enjoyment do not stand on the same footing. It is a well-settled rule now that if forty-five degrees of sky are left unobscured, that is primâ facie evidence that the plaintiff will suffer no injury; but it is difficult to see how that rule came to be established if there is not such a limitation of the plaintiffs' right as is contended for by the defendant.

Young, *Q.C.*, in reply.

Cur. adv. vult.

Aug. 4. WRIGHT J. This case raises a question of general importance in relation to ancient lights, namely, whether the right which is acquired by statutory prescription is a right to a continuance of substantially the whole quantity of light which has come to the windows during the twenty years, or is limited to a sufficient quantity of light for all ordinary purposes of inhabitancy or business. It seems strange that such a question should be still open for discussion; but there is a considerable body of authority in favour of either proposition.

The facts are these: The plaintiffs, as the owners and tenants of a building in the town of Leicester, claim damages and an injunction in respect of obstruction of the access of light to windows more than twenty years old. At the trial the claim was limited to two rooms, one on the ground-floor and the other above the former, both facing to the south. For a length of about 17 feet in front of these rooms the defendant has raised his own building from a height of about 20½ feet to about 26 feet, but has set it back 2 or 3 feet, so that the width of the street between the two buildings, which was about 17 feet, is now about 19 feet. Four out of five windows in each of the two rooms are opposite to that part of the defendant's building which I have mentioned. These windows are large and high. Those of them which are on the ground-floor have been glazed with fluted glass for about half their height from the bottom. In addition to the front light, both rooms receive much side light, especially from the east and south-east, from a wide street running north and south at a distance of about 50 feet to 70 feet. Light is not in any direction cut off by very high

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buildings. To the south-east the defendant has taken down a high chimney stack, which to some extent used to interrupt the light from that quarter.

I find that the defendant has not obstructed or diminished to any material extent, if at all, the light coming to the upper of the two rooms in question. As regards the four windows on the ground-floor, I find that the defendant has materially diminished the light which the plaintiffs have enjoyed for those windows for twenty years past, but that abundant light remains for all ordinary purposes of inhabitancy or business. The room in its present state is better lighted than the ground-floor front rooms in many of the principal streets.

The plaintiff Baum has during some years, but much less than twenty, carried on as tenant of the premises in question, and particularly in the ground-floor room in question, a manufacture of hosiery by means of machinery which requires a very exceptional quantity and quality of light for the continual and accurate adjustment of filaments to fine needles moving at speed in bundles of some hundreds. Before this manufacture was established a different industry—manufacture of boots and shoes—requiring good but not special or extraordinary light, was carried on there.

I find that the defendant has by the acts complained of diminished the light, so that it is now materially insufficient during some part of the day for the special requirements of the plaintiff Baum's industry.

I find that the plaintiffs' premises have throughout the twenty years before action been suitable for such a manufacture as that now carried on by Baum, and that this kind of manufacture is and has long been common in the district, and has for twenty years past required more light than most other industries, but not until the last few years in so high a degree as at present, the older machines having been less delicate and complicated. I think that the light as it now exists would have been sufficient for any but the most recent kinds of machines.

In my judgment, no sufficient case for a mandatory injunction is made out in any view of the plaintiffs' rights. The inconvenience to which the plaintiff Baum was subjected can be,

and to a great extent it has been, obviated by the removal of the machines to the upper room, and in any case it can be remedied by some increased expenditure for gas. The question is whether the plaintiffs are entitled to damages. If they are, I assess the amount at 100*l.* for the tenant and 200*l.* for the reversioners.

There are scarcely any authorities bearing on the question until 1865. It appears from *Aldred's Case* (1) that the nature of the cause of action on the case for infringement of rights to light was not clearly settled. It is classed with actions for nuisance, and the pleading closes with the words, "Quod messagium horridâ tenebritate obscuratum fuit"; but a prescription is alleged. In *Luttrell's Case* (2) it is laid down that (as was afterwards established by *Yates* v. *Jack* (3) and other cases) "if a man has an old window to his hall and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house." In 1752, in *Fishmongers' Co.* v. *East India Co.* (4), Lord Hardwicke said: "It is not sufficient to say it will alter the plaintiff's lights, for then no vacant piece of ground could be built on in the City; and here will be 17 feet distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground." In 1808, in *Martin* v. *Goble* (5), a malthouse with ancient windows had been occupied for some years as a poorhouse. McDonald C.B. directed the jury that "the house was entitled to the degree of light necessary for a malthouse, not for a dwelling-house. The converting it from one into the other could not affect the rights of the owners of the adjoining ground. No man could by any act of his suddenly impose a new restriction upon his neighbour." In *Attorney-General* v. *Nichol* (6) Lord Eldon L.C. says: "There are many obvious cases of new buildings darkening those opposite to them, but

(1) 9 Rep. 57 a.
(2) 4 Rep. 87.
(3) (1866) L. R. 1 Ch. 295.
(4) 1 Dick. 163.
(5) 1 Camp. 320.
(6) (1809) 16 Ves. 338; 10 R. R. 186.

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not in such a degree that an injunction could be maintained, or an action upon the case; which however might be maintained in many cases which would not support an injunction." In *Back* v. *Stacey* (1) Best C.J. directed the jury that in order to ground an action there must be a "substantial privation of light, sufficient to render the occupation of the house uncomfortable and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done." In the forty years after *Back* v. *Stacey* (1) there seems to have been few or no decisions bearing on the question; but in 1865, in *Clarke* v. *Clark* (2), Lord Cranworth refused an injunction in a case in which exceptionally good light had been materially diminished, saying that the plaintiff must shew such an obstruction "as to cause material inconvenience to the occupiers of the house in the ordinary occupations of life." He proceeded to draw a distinction between town and country which has not been fully adopted in later cases. In *Durell* v. *Pritchard* (3) and *Robson* v. *Whittingham* (4) Knight Bruce and Turner L.JJ. adopted the language of Lord Cranworth. In *Yates* v. *Jack* (5) Lord Cranworth established the rule which has ever since that case been recognised as settled, so far at any rate as ordinary purposes of inhabitancy or business are concerned, that the owner of ancient lights is entitled to have them protected without reference to the particular purposes for which they were enjoyed during the twenty years, and he does not apparently draw any distinction between ordinary and extraordinary purposes. In the same year, in *Dent* v. *Auction Mart Co.* (6), Wood V.-C. established another rule, that an injunction should not be granted in equity unless it is a proper one for substantial damages at law. He adopted the ruling of Best C.J. in *Back* v. *Stacey* (1), with a material emendation of "or" for "and." In the same year, in *Martin* v. *Headon* (7), Kindersley V.-C. laid it down that "Wherever it is shewn that the comfort or enjoyment of a man or his family in the occupation of his house

(1) (1826) 2 C. & P. 465; 31 R. R. 679.
(2) (1865) L. R. 1 Ch. 16.
(3) (1865) L. R. 1 Ch. 244.
(4) (1866) L. R. 1 Ch. 442.
(5) L. R. 1 Ch. 295.
(6) L. R. 2 Eq. 238.
(7) (1866) L. R. 2 Eq. 425.

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is seriously interfered with, and still more where he is prevented from carrying on his business with the same degree of convenience and advantage as theretofore . . . . there is sufficient ground for the interference of this Court." In 1867, in *Calcraft* v. *Thompson* (1), Lord Chelmsford approved the ruling of Best C.J. in *Back* v. *Stacey* (2), but not, as it seems, of the emendation proposed by Wood V.-C. He adopts the language of Lord Cranworth in *Yates* v. *Jack* (3), that the right conferred by the statute "is an absolute and indefeasible right to the light without reference to the purpose for which it is used . . . . The right which is gradually ripening, and which after twenty years' enjoyment is absolutely acquired, is a right to have the light freely admitted to the house through an aperture of certain dimensions. The particular use to which the house is applied during the period in which the right is thus growing never enters at all into consideration. When the full statutory time is accomplished, the measure of the right is exactly that (neither more nor less) which has been uniformly enjoyed previously." Later in the same year, in *Lanfranchi* v. *Mackenzie* (4), it was held by Malins V.-C. that where ancient windows had received an extraordinary amount of light during the twenty years, and the plaintiff had used it for a purpose requiring an extraordinary light (examination of silks) for only a portion of that period, he had no right to an injunction on the ground of an obstruction which left him enough light for all ordinary purposes, though not enough for the extraordinary purpose. He thought, however, that if the plaintiff had been "in the enjoyment of an extraordinary user for twenty years, that would establish the right against all persons who had reasonable knowledge of it." In 1871, in *Kelk* v. *Pearson* (5), James L.J. said: "On the part of the plaintiff it was argued before us that this was an absolute right—that now, under the statute 2 & 3 Will. 4, c. 71, he had an absolute and indefeasible right by way of property to the whole amount of light and air which came through the windows into his house; and that he

(1) 15 W. R. 387.
(2) 2 C. & P. 465.
(3) L. R. 1 Ch. 295.
(4) L. R. 4 Eq. 421.
(5) L. R. 6 Ch. 809.

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could maintain an action at law or a suit in equity upon that absolute legal right; and the only question as to the effect or extent of his right would be with regard to the discretion of this Court in considering whether it was a case for damages or to be interfered with by way of injunction. Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable." It is to be observed that the last five words of the last sentence, and some expressions of Mellish L.J., raise some doubt as to the meaning of the former sentence, but in *City of London Brewery Co.* v. *Tennant* (1) the former sentence is adopted. Mellish L.J. agreed that the statute has not altered the nature of the right, and said that it must be the same as that which is acquired by "implied grant from what is called the disposition of the owner of two tenements"—a right, that is to say, which in the absence of special circumstances could not be more than what is sufficient for ordinary purposes of inhabitancy or business. He proceeded to dissent in effect from that part of Lord Cranworth's judgment in *Clarke* v. *Clark* (2) which suggested a possible difference between town and country, and which James L.J. had been disposed to admit as stating an element proper for consideration in granting or refusing an injunction. In 1873, in *Dickinson* v. *Harbottle* (3), Malins V.-C. followed his own decision in *Lanfranchi* v. *Mackenzie* (4), saying that in the absence of twenty years of extraordinary use no right is

(1) L. R. 9 Ch. 212.
(2) L. R. 1 Ch. 16.
(3) 28 L. T. (N.S.) 186.
(4) L. R. 4 Eq. 421.

acquired to more than "the ordinary quantity of light necessary for the ordinary purposes of life." The question was again raised in the Court of Appeal in 1873 in *City of London Brewery Co.* v. *Tennant* (1), before Lord Selborne L.C. and James and Mellish L.JJ. James L.J. said: "In all these cases as to light and air the Court of Equity is not administering any equitable relief strictly so called, but is giving an equitable remedy for the violation of a legal right, and the question before a court of equity in all these cases is substantially the same question as that which would have to be determined by a jury under proper directions of a judge as to the principles of law applicable to the case. Here we have to charge ourselves, performing the functions of both judge and jury, in the same manner as if we were charging a special jury. In the case of *Kelk* v. *Pearson* (2) the Lord Justice and myself endeavoured to express what we thought to be the rule applicable to these cases, and I believe the Lord Chancellor entirely agrees with the mode in which it is there expressed. We only repeated in different words what is to be found in many previous cases, that the extent of the right of an owner of ancient lights is to prevent his neighbour from building so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable—that is to say, that he is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business." Lord Selborne L.C. said: "I entirely agree with the judgment which the Lord Justice James has delivered," expressly adhering to the language of *Kelk* v. *Pearson* (2), and adding that the supposed rule as to forty-five degrees is no rule of law, but that if forty-five degrees are left that is some primâ facie evidence of the light not being obstructed to such an extent as to call for the interference of the Court. Mellish L.J. said: "I am entirely of the same opinion." In *Leech* v. *Schweder* (3)

(1) L. R. 9 Ch. 212. (2) L. R. 6 Ch. 809.
(3) L. R. 9 Ch. 463.

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James and Mellish L.JJ. held that there is no difference in extent and nature between the right acquired under the statute and a right acquired by "the disposition of the owner of the two tenements"; and that "practically there is no difference with respect to light in the amount of damage which would entitle a person to maintain an action at law and that which would entitle him to file a bill in equity." (1) In *Aynsley* v. *Glover* (2) it was finally settled that the right to light for a room is not limited by the fact that before the obstruction the room was used for purposes requiring little of the light which came to it, and *Bach* v. *Stacey* (3), as amended by Wood V.-C. in *Dent's Case* (4), was approved; but the case does not seem to contain anything affecting the present question, nor are there any criticisms on *Kelk* v. *Pearson* (5) or *City of London Brewery Co.* v. *Tennant.* (6)

There are no subsequent reported decisions of the Court of Appeal which are in point, and the last-mentioned decision of the Court would, as I understand it, be decisive of the matter, subject only to review in the Court of final appeal. This view, however, seems not to have been universally adopted, a different view having been apparently taken by the Court of Appeal in Ireland, by the whole or a majority of a Divisional Court in England, and in two or three cases by my brother Kekewich. In *Moore* v. *Hall* (7) the actual decision was merely, in accordance with most of the authorities, to the effect that the plaintiff's right was not limited, as was formerly laid down in *Martin* v. *Goble* (8), to the protection of the use for which the ancient windows had before obstruction been applied, namely, as windows for a bedroom; but two of the members of the Court, Mellor and Manisty JJ., appeared to lay it down as a rule of law that the plaintiff's right is to have the light flow in the same quantity as through the period of prescription. Cockburn C.J. qualified that view by saying that the question is "whether there is any diminution of light for any purpose

(1) L. R. 9 Ch. 463, at p. 476.
(2) L. R. 18 Eq. 545; 10 Ch. 283.
(3) 2 C. & P. 465.
(4) L. R. 2 Eq. 238.
(5) L. R. 6 Ch. 809.
(6) L. R. 9 Ch. 212.
(7) 3 Q. B. D. 178.
(8) 1 Camp. 320.

for which the dominant tenement may be reasonably considered available." The Court of Appeal in Ireland in *Mackey* v. *Scottish Widows Society* (1) declined to follow *Lanfranchi* v. *Mackenzie* (2) and *Dickinson* v. *Harbottle* (3); and Christian L.J., in a judgment the report of which is stated not to have been revised by him, is represented to have laid it down (4) that "the right is to an average maximum of the light which nature has been shedding upon the window for twenty years before the defendant interrupted it," and to have strongly criticised the judgment of James L.J. in *City of London Brewery Co.* v. *Tennant* (5), denying that Lord Selborne concurred with it. None of the reports of that case, however, seem to support that denial, nor does the alteration which Christian L.J. suggests should be made in James L.J.'s statement of the law apparently conflict with what James L.J. intended to state, or affect the present question. The alteration merely embodies the rule that the plaintiff's right is not limited to the particular use to which his premises had been actually put before the obstruction. There remains the case of *Lazarus* v. *Artistic Photographic Co.* (6), in which Kekewich J. declined to follow *Lanfranchi* v. *Mackenzie* (2), and held that the plaintiff was entitled to be protected in the enjoyment of extraordinary light for photographic purposes, although he had not been using it for those or other purposes requiring extraordinary light for the full period of twenty years. No reference is made in the report of the case to either of the decisions of the Court of Appeal.

In this state of the authorities, I think I must take it that the law is as laid down in *City of London Brewery Co.* v. *Tennant* (5), agreeing as that case does with the criterion expressed by Lord Cranworth in *Clarke* v. *Clark* (7), and that the plaintiffs, having an abundance of light left for all ordinary purposes of inhabitancy or business, are not entitled to relief on the ground that their extraordinary use has been interfered with. Unless, indeed, there is some such limitation of the

(1) (1877) Ir. Rep. 11 Eq. 541.
(2) L. R. 4 Eq. 421.
(3) 28 L. T. (N.S.) 186.
(4) Ir. Rep. 11 Eq. 541, at p. 564.
(5) L. R. 9 Ch. 212.
(6) [1897] 2 Ch. 214.
(7) L. R. 1 Ch. 16.

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right to light for ancient windows, it is difficult, as Lord Hardwicke observed in *Fishmongers' Co.* v. *East India Co.* (1), to see how the ordinary extensions and improvements of towns could be carried on. If every house which has existed for twenty years is entitled to have all or substantially all the same light come to its windows as during the twenty years, no new houses could be built opposite to old ones unless at a distance which would impose on servient tenements an unreasonable burden, and might involve grave public inconvenience. Nor, if that were the law, could there well be any presumption that so long as forty-five degrees, or some approximate angle, is left there is no actionable wrong.

It is not necessary in the present case to consider the question raised in *Lanfranchi* v. *Mackenzie* (2), whether a right to an extraordinary quantity of light for extraordinary purposes can be acquired by prescription.

Judgment for the defendant.

Solicitors for plaintiffs: *Law & Worssam, for R. H. Buckby, Leicester.*

Solicitor for defendant: *J. A. Collins, for J. & S. Harris, Leicester.*

(1) 1 Dick. 163.

(2) L. R. 4 Eq. 421.

J. F. C.

WALKER *v.* BRISLEY.
GRINTER *v.* FLEMING.

1900
June 26.

Revenue—House Duty—Annual Value—Full and Just Yearly Rent—House Tax Act, 1851 (14 & 15 *Vict. c.* 36); 48 *Geo.* 3, *c.* 55, *Sched. B.*

The commissioners for inhabited house duty, when assessing for the purposes of that duty a house situate outside the metropolis, are not bound by the assessment appearing in the poor-rate book, but ought to receive independent evidence to enable them to arrive at the annual value.

Where a house is let to a brewer at one rent and sub-let by him to a licensed victualler at a lower rent upon the terms of the latter buying all his beer from him, the full and just yearly rent for the purposes of inhabited house duty is not the lower rent paid by the sub-tenant to the brewer, nor is it necessarily the higher rent paid by the brewer to his lessor, but the commissioners ought to receive evidence of the sum which the house is worth let by the year as a free house.

Two Cases stated by commissioners for general purposes of income tax and inhabited house duty on appeal against assessment for inhabited house duty.

WALKER & SON, LIMITED *v.* BRISLEY.

At a meeting of the commissioners of income tax and inhabited house duty for the district of Prescot, in the county of Lancaster, Peter Walker & Son, Limited, who carry on the business of brewers and maltsters at Liverpool, Warrington, Burton, and elsewhere, appealed against an assessment on them as occupiers for inhabited house duty on a fully licensed public-house numbered 58–60, St. Oswald Street, in the township of West Derby in the said district, on an annual value of 200*l.*

The appellants are owners as well as occupiers.

The gross annual value of the premises is stated to be 135*l.* in the poor-rate made before the time of making the assessment appealed against.

It was contended on behalf of the appellants that the assessment was too high, because:—

1. The full and just yearly rent which the premises were

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really and bonâ fide worth to be let by the year was 120*l.*, and the assessment ought to be reduced to that sum.

2. As a matter of law the premises might not in any case be assessed on a greater annual value than the amount of the gross annual value stated in the poor-rate, and that therefore the assessment ought at least to be reduced to that amount, although the commissioners should decide that the actual annual value was in fact greater.

It was contended for the respondent, the surveyor of taxes, that the annual value charged in the inhabited house duty assessment was the full and just yearly rent which the premises were really and bonâ fide worth to let, and that the annual value was not limited to the gross annual value stated in the poor-rate as a maximum.

The commissioners heard the evidence of value adduced by the appellants, and, after considering the facts and the point of law raised, decided that the amount of the assessment of the premises for the purpose of inhabited house duty was not restricted as a maximum to the gross annual value stated in the poor-rate, but must be on the full and just yearly rent which the premises were really and bonâ fide worth to be let, and, being satisfied that the annual value of 200*l.* stated in the said assessment to inhabited house duty was the full and just yearly rent, they confirmed the assessment.

Cripps, *Q.C.*, and *Horridge*, for the appellants. The House Tax Act, 1851, under which the inhabited house duty is now levied, provides that the duty shall be payable according to the annual value of the dwelling-house, and refers back to and incorporates the rules set forth in Sched. B in 48 Geo. 3, c. 55, as to the manner in which the annual value is to be arrived at. (1) Rule 8 of that schedule provides that in case the

(1) By the House Tax Act, 1851 (14 & 15 Vict. c. 36), s. 2, it is provided that the provisions and rules contained in any Acts relating to assessed taxes with reference to the duties on inhabited dwelling-houses, according to the value thereof as set forth in Sched. B to the Act of 48 Geo. 3, c. 55, shall be "in full force and effect with respect to the duties hereby granted and shall be . . . . duly observed . . . . for assessing . . . . the duties hereby granted . . . . so far as the same are or shall

poor-rate shall have been made by a pound rate "on the full annual value" of the dwelling-houses in the parish, then the assessment to the inhabited house duty shall be made according to the said rate. The poor-rate is now invariably so made; therefore the case falls within that rule; the commissioners are bound by the assessment in the rate-book, and are not allowed to take evidence of an independent valuation. Secondly, of the two columns appearing in the rate, that of the gross estimated rental and that of the rateable value, the commissioners must take the latter. The doctrine of *Dobbs* v. *Grand*

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be applicable . . . . as fully and effectually . . . . as if the same . . . . were particularly repeated and re-enacted in this Act with reference to the said duties hereby granted."

By the House Tax Act, 1803 (43 Geo. 3, c. 161), s. 10, every dwelling-house is to be charged in respect of the duties set forth in the schedule thereto "According to the full and just yearly rent at which the same is really and bonâ fide worth to be let."

By Sched. B of the House Tax Act, 1808 (48 Geo. 3, c. 55), which gives the rules for charging the duties (rule 7): "No dwelling-house or other such premises as aforesaid shall be estimated or rated at any less annual value than the rent or value at which the same premises stand charged in the last rate made on or before the time of making the assessment for the relief of the poor in the same parish or place."

Rule 8: "In case the said poor-rate shall have been made throughout by a pound rate on the full annual value of all the dwelling-houses in the same parish or place then such assessment shall be made according to the said rate."

Rule 9: "In case the said poor-rate shall have been made on any proportionate part of such value then such assessors shall assess the same at the same sums respectively as they would have been assessed at by virtue of this Act if the same had been respectively estimated in such poor-rate at the full value thereof respectively."

Rule 10 provides what the assessors shall do "In case the poor-rate in any parish or place shall not be made on the full annual value of the different dwelling-houses charged, nor according to any proportionate part of such annual value, but nevertheless the said dwelling-houses shall be rated in a due proportion to each other."

Rule 11: "In case any house with the premises aforesaid therewith occupied shall not be rated in such poor-rate, or shall be rated therein together with other property not chargeable to the duties hereby granted, or there shall be no poor-rate in the parish or place where such house is situate, and in every case where the rules before mentioned are not applicable, the said assessors shall make their assessment from the best information they can obtain of the annual value thereof, which in all cases shall be the actual amount of the rent at which the said houses and premises aforesaid respectively are let, or, if not let, the rent which they respectively are worth to be let by the year."

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Junction Waterworks Co. (1), that annual value means net rateable value and not the gross value, is a doctrine of general application, and wherever in an Act of Parliament the "value" of premises is made the basis of a rate or charge, that term value, even when coupled with the word "full," shall be taken to mean the rateable value: *Rose* v. *Watson.* (2)

Sir E. Carson, S.-G., and *Danckwerts, Q.C.*, for the Crown. The case does not fall within rule 8. The Act of 1851 only incorporated the rules of Sched. B "so far as the same are or shall be applicable." Rule 8 is not applicable—that rule deals with a case in which the poor-rate is made on the full annual value, and that expression "full annual value" means the rack rent. Throughout the rules in that schedule, and in the Act of 43 Geo. 3, c. 161, under which the taxes set forth in that schedule were levied, the term value is treated as equivalent to the full and just yearly rent at which the premises are worth to be let. That that is the parliamentary sense of the term "value" in Taxing Acts of this description appears plainly from the Income Tax Act, 1842. By s. 60 of that Act, Sched. A, No. 1, "The annual value of lands . . . . charged under Sched. A shall be understood to be the rent by the year at which the same are let at rack rent." And by s. 64, No. 11, where the last rate for the relief of the poor was made "on the annual value as the same would be estimated according to Sched. A," that is to say, on the rack rent, the assessment to income tax is to follow the rate.

But if the term "full annual value" in rule 8 of the House Tax Act, 1808, means the rack rent, then that rule is not applicable, for rates are no longer made upon the rack rent. The Income Tax Act, like the House Tax Act, was copied from an earlier Act, and the Legislature in both the Income Tax and House Tax Acts incorporated the rules of the earlier Acts en bloc, forgetting the alteration of the law of parochial rating which had taken place in the interval by reason of the provisions of the Parochial Assessment Act, 1836. Nor, for the same reason, are rules 9 or 10 applicable. There remains only rule 11, according to which the assessors are to

(1) (1883) 9 App. Cas. 49. (2) [1894] 2 Q. B. 90.

"make their assessment from the best information they can obtain of the annual value thereof, which in all cases shall be the actual amount of the rent at which the said houses and premises aforesaid respectively are let or, if not let, the rent which they respectively are worth to be let by the year." The appellants are driven to contend that the house duty is to be levied on the rateable value; but if they are right in that, there would be a different basis of assessment inside the metropolis and outside. For by the Valuation Metropolis Act, 1869, s. 45, "in construing the House Tax Act and the Acts therein incorporated or referred to the full and just yearly rent shall be deemed to be the gross value stated in [the valuation] list." That section indeed makes the valuation list conclusive evidence of the gross value; but the reason of that is that in the metropolis the overseers are by s. 8 to send a duplicate of the valuation list to the surveyor of taxes, who by s. 12 is to have a right of objecting to the list, whereas outside the metropolis the surveyor of taxes is not a party to the rate. The contention of the Crown is further supported by reference to the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), by s. 57, sub-s. 2, of which "All appeals against the inhabited house duties shall be determined in like manner as appeals under Sched. A of the Income Tax Acts." By s. 81 of the Income Tax Act, 1842, if upon an appeal a dispute arises as to the value of any land, the commissioners may order an actual valuation to be made. And by s. 47 of the Income Tax Act, 1853, the appellant may require the commissioners to appoint a valuer. These provisions would be unmeaning if the poor-rate assessment was binding upon the parties.

Horridge, in reply. The argument from the Valuation Metropolis Act, 1869, cuts both ways. If the contention of the Crown is right, there would be one standard of assessment for both poor-rate and inhabited house duty in the metropolis, namely, the rate-book, but different standards in the country.

GRINTER *v.* FLEMING.

At a meeting of the commissioners for the general purposes of the Income Tax Acts and for executing the Acts relating to

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the inhabited house duties for the division of Yeovil, in the county of Somerset, George Grinter, of Ilchester, in the said division, innkeeper, appealed against an assessment to inhabited house duty at the rate of 4*d.* in the pound upon 60*l.*, the rent or annual value of the premises known as the Bull Inn at Ilchester.

The following facts were proved or admitted:—

1. The said G. Grinter was the occupier of the premises the subject of the assessment, and held them of Messrs. Ord, Battiscombe & Elwes, brewers, of Somerton, Somerset, on a yearly tenancy at a rental of 14*l.* per annum under an agreement dated March 17, 1898, whereby he covenanted (inter alia) to purchase all his beer, spirits, and mineral waters of the said Ord, Battiscombe & Elwes. It was also provided thereby that there should be a further rent of 10*l.* payable in every year in which the tenant contrary to his agreement should buy beer, spirits, or mineral waters of any other persons; and that there should be a further rent of 10*l.* in every year in which the tenant should at any time be indebted to the lessors in a sum exceeding 30*l.* for liquors supplied to him by them, and should fail to pay such debt within twenty-four hours after demand in writing.

2. Messrs. Ord, Battiscombe & Elwes held the premises from the freeholder on a lease dated May 6, 1893, for a term of ten years at a rental of 60*l.* per annum, and they were bound to do all repairs.

3. For the last poor-rate, which was made before the time of making the said assessment to the inhabited house duty in the parish in which the said premises are situated, the premises were assessed at the sum of 23*l.* as the gross estimated rental, and 19*l.* 16*s.* as the rateable value.

4. The rent of 14*l.* per annum paid by the appellant as aforesaid was less than the full and just yearly rent at which the said premises are worth to be let by the year as a free house to the occupier thereof, inasmuch as the appellant gave additional consideration for the tenancy of the said premises—namely, the covenant referred to in paragraph 1 hereof to purchase all beer, spirits, and mineral waters of his landlords.

5. The said house was assessed for income tax under Sched. A at the annual value of 60*l.*, and no appeal was lodged against that assessment.

6. It was contended on behalf of the appellant :—

(1.) That the assessment of the premises to the inhabited house duty should be the same as the rateable (or in the alternative the gross) assessment of the said premises for the poor-rate.

(2.) In the alternative that the assessment of the premises to the inhabited house duty ought to be upon the full and just yearly rent at which the said premises are worth to be let by the year as a free house to the appellant as the occupier thereof, and not upon the rent which his landlords might pay for the premises on considerations personal to themselves.

(3.) That as there exists among the brewers in the district in which the said premises are situated and elsewhere great competition to secure licensed premises for the purpose of letting them as "tied houses," and thus making profits for themselves by increasing the sale and consumption of their own beer, spirits, and mineral waters, the commissioners ought to receive evidence (which the appellant offered to adduce) as to the annual value of the said premises, that is to say, the rent at which the premises are worth to let by the year as a free house.

(4.) That by reason of the said competition the rent of 60*l.* per annum paid by the said Ord, Battiscombe & Elwes was more than the full and just yearly rent at which the premises are worth to let by the year as a free house to the occupier thereof.

The commissioners were of opinion that the evidence which the appellant offered to adduce should not be admitted, and that the rent paid by Messrs. Ord, Battiscombe & Elwes for the premises represented the annual value for the purposes of inhabited house duty, and thereupon confirmed the assessment.

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Asquith, *Q.C.*, and *Loehnis*, for the appellant. Rule 8 is the rule applicable to the case, and the assessment to the inhabited house duty ought to be on the rateable value, or else on the gross value, appearing in the poor-rate book. But if rule 8 does not apply, and if the case falls within rule 11, then in cases in which the house is let the value is to be the "actual amount of the rent," by which is to be understood the rent paid by the occupier. Here the house is let, and the rent paid by the occupier is 14*l.* The assessment, therefore, ought to be reduced to that sum. It would be unreasonable to treat as the rent of the house for the purposes of rule 11 the rent which the brewers paid to the superior landlords. In *Bradford-on-Avon Assessment Committee* v. *White* (1) it was held that in assessing a licensed public-house to the poor-rate the gross estimated rental ought not to be fixed at the special sum, in excess of the annual value obtainable in the market, which a brewer might be willing to give on the chance of making large profits by letting the house as a tied house. The principle of that case is equally applicable to an assessment to inhabited house duty.

Sir E. Carson, *S.-G.*, and *Rowlatt*, for the Crown. On the question whether rule 8 or rule 11 applied, they relied on the same arguments as in the former case.

Secondly, it is not correct to say that 14*l.* is the actual amount of the rent paid by the occupier of this house. By the very terms of the lease he covenants to pay certain additional rents in certain events, and those contingent rents are capable of being presently valued. Further, his nominal rent is fixed at the low figure of 14*l.* in consideration of his covenanting to buy his liquors from his lessors, and his real rent includes a portion of the profits which the lessors derived from that covenant. In *Campbell* v. *Commissioners of Inland Revenue* (2), where the rent reserved by the lease of an hotel was a lump sum which was to include the consideration for the use of certain personal chattels, it was held that in order to arrive at the assessment of the hotel for the purpose of income tax the portion of the rent paid for the use of the movable subjects

(1) [1898] 2 Q. B. 630. (2) (1879) 17 Sco. L. R. 23.

might be deducted. The present is the converse case. It is conceded that the commissioners were wrong in not admitting evidence of the real rent of the premises, and the case should go back to allow of that question being determined.

Loehnis, in reply.

GRANTHAM J. Two cases have been argued before us, and I will give judgment first in the case of *Walker* v. *Brisley*. The difficulty which has arisen in this case is owing to the fact that the House Tax Act, 1851, under which the inhabited house duty is now levied, refers back to the schedule of the Act of 48 Geo. 3, c. 55, and that Act was passed at a time when there was no settled basis of assessment for the poor-rate adopted generally throughout the country. At that time the principle on which ratepayers were to be rated was left very vague. The Act of Elizabeth only required that they should be rated "according to their ability." Accordingly, as is matter of common knowledge, and as is recognised in the Act of 48 Geo. 3, a variety of principles of assessment were adopted in different parishes. This want of uniformity was immaterial so long as the object of the assessment was a matter of purely local concern like the poor-rate. It was a matter for the parishioners themselves; and whether they rated the various tenements in the parish at their full value or only at a fractional part of their value, it did not signify, so long as they rated them all proportionately. But when the question was one of imperial taxation it was obviously necessary to have a uniform principle of assessment which would operate throughout the country at large. And accordingly the Legislature framed the rules which we find in the schedule to the Act of Geo. 3 to guide the assessors in arriving at the proper valuation. Those rules are no doubt referred to and incorporated in the present House Tax Act of 1851, but they are incorporated only "so far as the same are or shall be applicable." Therefore we have to see whether they are applicable or not. The rule which was relied upon for the appellants was rule 8, which provides that "In case the said poor-rate shall have been made throughout by a pound rate on the full annual value of all the

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Grantham J.

dwelling-houses in the same parish or place then such assessment shall be made according to the said rate." Unless the words "full annual value" in that rule are to be interpreted as meaning nett annual value, the rule can have no application, for the poor-rate has never been made since 1836 on any value other than the nett annual value. And I do not think that, having regard to the practice at the date when the Act of Geo. 3 was passed, we should be justified in so interpreting the words "full annual value." Nor do I think that rules 9 or 10 are applicable. The assessors are thus driven to rule 11, according to which, in case the preceding rules are not applicable, they are to make their assessment from the best information they can obtain of the annual value, and are not to look at the poor-rate for their guide. They are to receive independent evidence to enable them to get at the full value in the ordinary sense of the term. And when we turn to the Taxes Management Act, 1880, it seems abundantly clear that the Legislature took the same view as to the meaning of the rules in the Act of Geo. 3; for in s. 57, which deals with the hearing of appeals from assessments, provisions are made for hearing evidence on behalf of the appellant and respondent. Our judgment must be for the Crown.

In the second case of *Grinter* v. *Fleming*, so far as the main question therein raised is concerned, the observations that I have already made in the case of *Walker* v. *Brisley* will apply. But there was a further question discussed as to whether, where a brewer has rented a house at one sum and sub-let to a licensed victualler at a lower sum on the terms of his covenanting to take all his beer from him, the assessors are bound to take the higher rent which the brewer pays as representing the rent which the premises are worth to let by the year. In my judgment they are not. They ought to take evidence, and ascertain for themselves what that rent is which the premises are worth to let by the year as a free house not subject to any requirement that the tenant shall take his beer from his lessor. In this case also our judgment must be for the Crown. But with regard to the question as to what the rent is, I think the case must go

back, as the commissioners were wrong in refusing to allow evidence to be given.

PHILLIMORE J. I agree that our judgment must be for the Crown in the case of *Walker* v. *Brisley*, but I base my judgment on somewhat narrow grounds. I think the Valuation (Metropolis) Act is a double-edged weapon. I do not think on consideration that any argument can be drawn from the Taxes Management Act, for I think that the provisions of that Act as to the holding of an independent inquiry into the value may be satisfied by supposing them to refer either to the income tax, or the land tax, or to the inhabited house duty in those cases which fall under rules 11 or 14. I agree that the Crown is driven for its taxing powers to the Act of Geo. 3. And I further agree that wherever rule 8 could apply the Crown would have to apply it and be bound by it. But I have come to the conclusion that the state of things contemplated by rule 8 does not now exist. I agree with my brother that probably the key to this matter lies in the fact that at the time of the Act of Geo. 3 there was no uniform system of rating, and that it is probable that at that date the assessment was in many cases actually based upon the rental value of the property assessed.

The question in this case turns upon the meaning of the words "full annual value" in rule 8. I agree that for the purposes of the Waterworks Clauses Act, I agree that for the purposes of the Church Rate Act, and I agree that very likely for the purposes of many other Acts the words "full annual value" mean the nett value after all proper deductions have been made. But I am satisfied that in the Act of Geo. 3 the words mean the rent that is to be got from the premises. I think the initial words of Sched. B help us very much. They are as follows: "A schedule of the duties made payable on all inhabited dwelling-houses throughout Great Britain according to the value thereof." Then follow the words: "For every such inhabited house which (with the premises therewith occupied) are or shall be worth the rent hereinafter mentioned by the year there shall be charged the yearly sums following, &c."

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Phillimore J.

To my mind that shews that when the statute spoke of value, certainly when it spoke of full value, it meant rent. And there are other parts of the Act which point in the same direction, notably rule 11, which speaks of the annual value as being the "actual amount of the rent at which the said houses and premises aforesaid respectively are let, or, if not let, the rent which they respectively are worth to be let by the year." Again, the House Tax Act, 1851, the present actual taxing Act, though it refers us back to the rules in the Act of George for the methods of ascertaining the value, throws light upon the sense in which the word value is used in those rules by the language of the schedule annexed to it. It is headed thus: "The schedule referred to containing the duties by this Act made payable upon inhabited dwelling-houses in and throughout Great Britain according to the annual value thereof; that is to say, for every inhabited dwelling-house which (with the premises therewith occupied) is or shall be worth the rent of twenty pounds or upwards by the year, &c." All this goes to shew that in the House Tax Acts value means rent. For these reasons I am of opinion that rules 8 and 9 do not apply. If rule 8 applies only to cases where the rating is upon the full rental value of the property, rule 9 would apply where the rating was on a proportionate part of the full rental value. While rule 10, which is admittedly difficult to understand, may possibly apply to cases in which the assessment is fair, not because the full value has been taken, nor because a proportion of that value has been taken, but because in each case proper deductions have been made, those deductions varying in proportion in respect of the different tenements rated, being different in respect of different classes of houses, and differing in the case of houses as opposed to lands. There remains, then, only rule 11, according to which it is the duty of the assessors to "make their assessment from the best information they can obtain of the actual value thereof," which is what the assessors in the present case have done. In my opinion our judgment should be for the Crown.

In the case of *Grinter* v. *Fleming*, so far as the points are the same, our judgment of course is the same. Then the appel-

lant turns the Crown's argument against it, and contends that if rule 11 governs the case, then as the house is let for a rent of 14*l.* a year, that sum is the value. The answer to that is that 14*l.* is not the rent. Rents were constantly in old days, and are sometimes now, paid partly in money and partly in kind; and I should have no hesitation in saying that the part of the return which is made in kind, such as the covenant to buy the landlord's beer, would have to be valued in order to arrive at the rent. And here I come to a little shadow of distinction between my brother and myself in the actual working out of the valuation, though I do not know whether it becomes important. I think the inquiry ought to be, not what the house is worth to let by the year—because it is actually let—but what is the rent? The rent is certainly more than 14*l.*, because if the tenant buys beer from any other brewer the landlords may impose at their option an additional rent of 10*l.* In other respects I agree with my brother. The case must go back to the commissioners.

Judgment for the Crown in Walker v. *Brisley.*

Case in Grinter v. *Fleming remitted to the commissioners.*

Solicitors in *Walker* v. *Brisley* :—

For appellants: *Field, Roscoe & Co., for Miller, Peel & Co., Liverpool.*

For respondent: *Solicitor for Inland Revenue.*

Solicitors in *Grinter* v. *Fleming* :—

For appellant: *Godden, Son & Holme, for Reed & Co., Taunton.*

For respondent: *Solicitor for Inland Revenue.*

J. F. C.

1900
July 20;
Aug. 10.

[IN THE COMMERCIAL COURT.]

STEAMSHIP BALMORAL COMPANY, LIMITED *v.* MARTEN.

Insurance, Marine—Policy—Ship Valued for Policy at less than Real Value—General Average Loss—Salvage—Liability of Underwriter.

The defendants insured the plaintiffs' ship for 33,000*l.*, the ship being valued in the policy at that sum. During the currency of the policy a general average loss was sustained and a salvage claim had also to be paid. In the salvage action and the average statement the value of the ship was fixed at 40,000*l.*, and the rights of all parties were adjusted on that footing. In an action on the policy:—

Held, that the defendants were only liable to make good to the plaintiffs thirty-three-fortieths of the salvage and general average losses.

ACTION tried in the Commercial Court by Bigham J. without a jury.

The plaintiffs, the owners of the steamship *Balmoral*, on December 5, 1898, insured their vessel with the defendants for twelve months from that date for 33,000*l.* During the currency of the policy a general average loss was sustained and a salvage award was made against ship, freight, and cargo, and thereupon an average statement was made up. In the salvage action the value of the *Balmoral* was proved to be 40,000*l.*, and the rights of the parties interested were regulated for the purpose also of the general average statement, on the footing of that being the correct value of the ship. The plaintiffs now sought to recover from the defendants the whole of the proportion of the salvage and of the general average contribution due in respect of the ship. The defendants contended that, as the ship was only valued in the policy at 33,000*l.*, the plaintiffs could not recover from them more than thirty-three-fortieths of this amount.

Leck (*Joseph Walton, Q.C.*, with him), for the plaintiffs. The plaintiffs are entitled to recover from the defendants the whole amount of the ship's contribution. The ship was fully

insured, and the defendants cannot be heard to say that it was only partially insured. There may be a difference between the salvage loss and the general average loss, because salvage is recoverable as a direct loss under the policy, and no question of contribution arises: *Aitchison* v. *Lohre*. (1) In general average contribution some value has to be put on the ship for the purpose of the adjustment, whereas in salvage it is not necessary that any value should be put on the ship. Here the underwriter has undertaken to indemnify the shipowner against a loss which has in fact happened, and he must therefore pay the whole, and not merely a part, of this loss. The value in the policy is conclusive: *Dixon* v. *Whitworth* (2); *North of England Iron Steamship Insurance Association* v. *Armstrong*. (3) The practice of average adjusters is immaterial, as it does not bind the Court: *Svendsen* v. *Wallace*. (4)

Pickford, Q.C. (*Scrutton* with him), for the defendants. The liability of the underwriters is the same both in respect of the salvage and of the general average, though the practice is more established in regard to general average. The defendants are only liable for thirty-three-fortieths of the contribution payable by the ship in respect of both losses. This proposition is in accordance both with principle and universal practice. The fundamental principle of insurance is indemnity, and where the actual value of the thing insured exceeds the insured value, the underwriter has only to pay the amount which he has actually insured. *Dixon* v. *Whitworth* (2) is no authority, because the judgment of Lindley J. in that case, that salvage came within the suing and labouring clause, was expressly overruled by the House of Lords in *Aitchison* v. *Lohre*. (1) [He also cited *Lewis* v. *Rucker* (5), *Pitman* v. *Universal Marine Insurance Co.* (6), and *Price* v. *A1 Ships' Small Damage Insurance Association*. (7)]

Leck replied.

Cur. adv. vult.

(1) (1879) 4 App. Cas. 755.
(2) (1879) 4 C. P. D. 371.
(3) (1870) L. R. 5 Q. B. 244.
(4) (1885) 10 App. Cas. 404.
(5) (1761) 2 Burr. 1167.
(6) (1882) 9 Q. B. D. 192.
(7) (1889) 22 Q. B. D. 580.

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Aug. 10. BIGHAM J. read the following judgment:—In this case the defendants underwrote a policy of marine insurance on the plaintiffs' ship for 33,000*l.*, the ship being valued in the policy at the same sum. While the policy was current a general average loss was sustained and a salvage claim had to be paid, and thereupon an average statement was made up. The real value of the ship at the time of the average statement was 40,000*l.*, and the rights of the different parties interested—namely, owners of ship, freight, and cargo respectively—were regulated inter se on that footing. The question is whether the defendants must indemnify the plaintiffs against the whole of the average loss payable by them, or only against thirty-three-fortieths thereof. The question divides itself into two parts, namely, that relating to the general average loss, and that relating to the salvage claim. As to the general average loss, the evidence satisfies me that the practice in this country is for the underwriter on a valued policy to pay only the proportion which the value in the policy bears to the actual value on which the statement has been made up. Applying the rule of practice to the present case, the defendants will only be liable to make good to the plaintiffs thirty-three-fortieths of the general average loss. The plaintiffs say that this rule is inconsistent with the contract contained in the policy, because, as between themselves and the defendants, the ship is a fully insured ship. She is, they say, by agreement valued at 33,000*l.*, and she is insured for that same sum; and being fully insured they are entitled to a full indemnity against the general average claim. But I think it is the plaintiffs' contention, rather than the defendants', which is inconsistent with the terms of the policy; for the defendants have promised to be bound on the basis of the ship being worth 33,000*l.*, whereas the plaintiffs are asking them to pay on the footing of the ship being worth 40,000*l.* The plaintiffs have not satisfied me that their contention is right. The rule of practice to which I have referred has been in force for nearly a century. I am asked to disregard it. If I did so, I should unsettle the basis on which existing policies for many millions of money have been made. I am not disposed to do this unless I see clear reasons for it. I see

reasons rather the other way, and, therefore, on this part of the question I find for the defendants. As to the claim for salvage loss, the practice has been for more than a century to treat such claims precisely as claims for general average are treated. I think, therefore, the defendants succeed on this part of the case also.

Judgment for the defendants.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

A. P. P. K.

EPSOM URBAN DISTRICT COUNCIL *v.* LONDON COUNTY COUNCIL.

1900
Aug. 8, 10.

Highway—Extraordinary Traffic—Person by or in Consequence of whose Order such Traffic has been conducted—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12.

The defendants, on March 2, 1898, entered into a contract with a firm to carry out for them certain building operations, and on March 16, 1898, they entered into another contract with another firm for the erection of temporary buildings. The work under the first contract was completed on April 15, 1899, and under the second contract on September 23, 1899. In the course of executing these contracts extraordinary traffic was conducted over certain highways within the plaintiffs' highway district, and they were put to extraordinary expenses in repairing them. In an action commenced on December 22, 1899, to recover these expenses from the defendants:—

Held, that the plaintiffs were entitled to succeed, since the extraordinary traffic had been conducted "by or in consequence of" the order of the defendants, within the meaning of s. 12 of the Locomotives Act, 1898, but that the proceedings to recover the amount in respect of the damage caused in the execution of the first contract were too late, having been commenced more than six months after the completion of that contract.

ACTION tried before Bigham J. without a jury.

The plaintiffs were the highway authority for the Epsom district, and they claimed from the defendants the sum of 484*l.* 15*s.* 11*d.*, the amount of extraordinary expenses incurred by them in repairing certain highways in that district. It

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appeared that the defendants, on March 2, 1898, for the purpose of providing a lunatic asylum for the county of London at Horton, entered into a contract with Messrs. Kirk & Randall, Limited, by which Kirk & Randall undertook to carry out for the defendants certain alterations and additions to an existing building known as Horton Manor. The works comprised in this contract were completed on April 15, 1899. On March 16, 1898, the defendants entered into a contract with Messrs. Leslie & Co., Limited, by which Leslie & Co. undertook to erect for them certain temporary buildings at Horton. The works comprised in this contract were completed on September 23, 1899.

For the purpose of the execution of these contracts, extraordinary traffic was conducted over the highways in question; but the defendants denied that it was so conducted by or in consequence of any order of theirs.

On July 12, 1899, the surveyor to the plaintiffs certified that, having regard to the average expenses of repairing highways along the line of traffic to the Horton Asylum, extraordinary expenses had been incurred by the plaintiffs in repairing such highways by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon.

The writ was issued on December 22, 1899.

Macmorran, Q.C. (*Cunningham Glen* and *Swinburne-Hanham* with him), for the plaintiffs. The case turns on the true construction of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by s. 12 of the Locomotives Act, 1898. (1) The latter Act altered the words "by whose order"

(1) By the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23, "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway .... that, having regard to the average expenses of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the

in the earlier Act into "by or in consequence of whose order." That alteration was made in consequence of the decision in *Kent County Council* v. *Lord Gerard* (1), and was expressly intended to meet such a case as the present. The person ordering work to be done which necessitates extraordinary traffic over the roads is now made liable for the expense of repairing them.

It is impossible to separate the damage done to the roads in the course of carrying out one contract from that done in the course of carrying out the other. It is said that Kirk & Randall's work had been finished more than six months before this action was commenced; but the work of building the asylum must be treated as a whole, and the period of limitation does not begin to run till the completion of that work. Then it is said that the surveyor's certificate is not in proper form, because it does not shew that the average expenses of repairing all the roads in the district have been taken into account, and not those merely of repairing the roads along the line of traffic. The test to be applied is that of the ordinary traffic over the roads in question: *Hill* v. *Thomas* (2); *Etherley Grange Coal Co.* v. *Auckland District Highway Board.* (3)

Dickens, Q.C., and *Daldy*, for the defendants. This extraordinary traffic was not caused by or in consequence of any

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damage arising from such weight or traffic as aforesaid."

By the Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12, "Sect. 23 of the Highways and Locomotives (Amendment) Act, 1878 . . . . shall be amended as follows:—

"(*a*) Expenses under that section shall cease to be recoverable in a summary manner, but may be recovered if not exceeding 250*l.* in the county court, and if exceeding that sum in the High Court.

"(*b*) Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or, where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work.

"(*c*) There shall be substituted for the words 'by whose order' the words 'by or in consequence of whose order.'"

By s. 21, "This Act shall not . . . . come into operation until January 1st, 1899."

(1) [1897] A. C. 633.

(2) [1893] 2 Q. B. 333.

(3) [1894] 1 Q. B. 37.

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order of the defendants, and they are not, therefore, liable: *Lapthorn* v. *Harvey*. (1) The Act of 1898 has no application, but if it has it is not retrospective, and cannot make the defendants liable in respect of such damage as might be caused to the roads prior to January 1, 1899. If the extraordinary traffic was caused by or in consequence of the defendants' orders, those orders were given before that date, and the defendants are, therefore, not liable.

The plaintiffs are clearly out of time in regard to Kirk & Randall's contract, since the work under that was completed on April 15, 1899, and the writ was not issued till December 22.

The certificate of the surveyor must shew that the average expenses of repairing all the roads in the neighbourhood, and not those only along the line of traffic, have been taken into consideration: *Reg.* v. *Williamson*. (2)

Macmorran, Q.C., replied.

Cur. adv. vult.

Aug. 10. BIGHAM J. read the following judgment:—The question in this case is whether the plaintiffs are entitled to recover from the defendants the cost of repairing the damage done to some roads in their district by certain exceptionally heavy traffic thereon. They contend that the traffic came on to the roads by or in consequence of the order of the defendants, and that, therefore, the defendants are liable under s. 23 of the Highways Act, 1878, as amended by s. 12 of the Locomotives Act, 1898. The facts are these: The defendants in the year 1898 entered into agreements with two firms of contractors for the erection of a temporary hospital, and for the alteration of certain existing buildings, so as to adapt them for use as a permanent hospital. The site of both buildings was in the plaintiffs' district, and the works involved the carriage of exceptionally heavy traffic along certain roads in the district. The work under one of these contracts (Kirk & Randall's) was completed by April 15, 1899. On July 12, 1899, the plaintiffs' surveyor granted a certificate in the following form for the purpose of complying with the requirements of

(1) (1885) 49 J. P. 709. (2) (1881) 45 J. P. 505.

s. 23 of the Act of 1878: "Extraordinary Traffic.—I hereby certify that, having regard to the average expenses of repairing highways along the line of traffic to the Horton Asylum temporary buildings, extraordinary expenses to the amount of 484*l.* 15*s.* 11*d.* have been incurred by you in repairing such highways by reason of the damage caused by excessive weight passing along the same or extraordinary traffic thereon. In calculating the above amount I have ascertained the cost of repairs of these roads for the past five years, and have deducted the average annual cost from the total expended. (Signed) Edward R. Capon." The writ was issued on December 22, 1899. The first question is whether the defendants are persons "by or in consequence of whose order" the traffic was conducted, within the meaning of the two Acts of Parliament. Under the earlier Act the persons made liable were those persons "by whose order" the traffic was conducted. By the later Act the words "by or in consequence of whose order" are substituted for the words "by whose order." In the case of *Kent County Council* v. *Lord Gerard* (1) the question arose as to the meaning of the expression "by whose order" which occurs in the earlier Act. In that case Lord Gerard had contracted with several persons for the delivery at his residence of certain material. Extraordinary expenses within the meaning of the statute were incurred by the road authority in repairing the roads over which the materials were brought to the house, and the plaintiffs sought to recover the amount from Lord Gerard. The House of Lords held that, inasmuch as Lord Gerard had bought the material "delivered," he had nothing to do with the conduct of the traffic along the roads; that the traffic was conducted by the order of the persons who had sold the goods "delivered," and that, therefore, Lord Gerard was not liable. In the Court of Appeal Lopes L.J. had read the words "by whose order" as equivalent to the words "in consequence of whose order," and had come to the conclusion (differing from the other members of the Court) that Lord Gerard was liable. The Lords did not think that this view was right, but they do seem to me to have expressed an opinion

(1) [1897] A. C. 633.

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(which, of course, was obiter) that, if it had been possible to give to the words of the statute the meaning which Lopes L.J. gave to them, then Lord Gerard would have been liable. The amendment in the Act of 1898 was introduced in consequence of the decision in Lord Gerard's case. The words "by whose order" were discarded, and the words "by or in consequence of whose order" were substituted. There can be no doubt that the object of the Legislature was to alter the earlier Act in such a way as to bring a case like Lord Gerard's within its scope. Whether the Legislature has succeeded may be open to doubt; but I am opinion that it has succeeded, and that if Lord Gerard's case had been decided under the later Act Lord Gerard would have been held to be liable. Then, is there any distinction in principle between Lord Gerard's case and the present case? In the former, the building owner contracted for the delivery of the building materials on his land; in the latter, the building owners (the London County Council) contracted for the erection of the buildings on their land. In each case the same consequence follows from the contract—namely, that the materials are conducted along the road. The only difference is that in the one case the materials belong to the building owner as soon as they are delivered, whereas in the other the materials do not belong to the building owner until they are worked into the structure by the contractor. In both cases orders were given—that is to say, contracts were made—and in both cases the consequence of the orders or contracts was that the traffic was conducted along the roads. I think that the plaintiffs are entitled on this, the main question in the case, to succeed. But then it was said that, inasmuch as the two building contracts were made before the later Act came into force—namely, before January 1, 1899—no orders within the meaning of that Act can be said to have been given at all. But I think it is not the giving of the order which creates the liability; it is the doing of the damage, and, therefore, though the contracts were made before the new Act, yet, if, and to the extent that, damage was done afterwards, I think the defendants are liable. Another point was taken on behalf of the defendants. It was said that in respect of the damage done in the execution

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of Kirk & Randall's work the proceedings to recover the amount were begun too late. I think that is so. The damage done by Kirk & Randall was, in my opinion, the consequence of their particular building contract, and, therefore, clause (*b*) of sub-s. 1 of s. 12 of the Act of 1898 applies. That provision is that "proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or, where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." Kirk & Randall's contract was completed on April 15, 1899, and the writ was not issued until December 22, 1899. Finally, it was said that the form of the surveyor's certificate was not sufficient because it does not appear on its face that in making it regard has been had to "the average expenses of repairing highways in the neighbourhood" within the meaning of the 23rd section of the Act of 1878. I think nothing of this point. I am quite satisfied that the certificate did make it appear to the plaintiffs that extraordinary expenses within the meaning of the section had been incurred; and, if it did that, it was a certificate which complied with the requirements of the law.

The amount recoverable by the plaintiffs must, therefore, be ascertained in accordance with the principles I have laid down, and I trust neither party will spend any more of the ratepayers' money in litigating this question.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Lyell & Co., for E. G. Wilson, Epsom.*

Solicitor for defendants: *Blaxland.*

A. P. P. K.

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March 17;
May 5;
July 2.

[CROWN CASE RESERVED.]

THE QUEEN *v.* OLLIS.

Criminal Law—False Pretences—Evidence—Admissibility—Proof of Guilty Knowledge—Acts in respect of which Defendant had been previously acquitted.

The defendant was indicted for obtaining a cheque by falsely pretending that another cheque, which he then gave to the prosecutor, was a good and valid order for the payment of money. The prosecutor deposed that he gave his cheque to the defendant on the faith of the defendant's statement that a cheque, which the defendant then gave to the prosecutor, was a good cheque. The cheque given by the defendant was dishonoured. The defendant stated that when he gave the cheque he expected a payment which would have enabled him to meet it. The defendant was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three cheques which were dishonoured. To prove guilty knowledge the prosecutor in the first case was called, and gave the same evidence as in the first case. The defendant was convicted, and the question as to the admissibility of the evidence was reserved:—

Held, by Lord Russell of Killowen C.J., Mathew, Grantham, Wright, Darling, and Channell JJ. (Bruce and Ridley JJ. dissenting), that the evidence which had been given on the first indictment, upon which the defendant had been tried and acquitted, was legally admissible upon the trial of the second indictment, for the purpose of proving guilty knowledge, and the conviction was right.

CASE stated by the recorder of Bath.

The defendant was tried at quarter sessions on October 13, 1899, on an indictment which stated that:—

"Thomas Edwin Ollis, on or about July 5, 1899, unlawfully, knowingly, and designedly, did falsely pretend to one Harold Fairbrother Ramsey that a certain paper writing, which he then produced to the said H. F. Ramsey, and was as follows—'X E. 2127. London. July 5, 1899. Birkbeck Bank, Southampton Buildings, W.C. Pay to H. F. Ramsey, Esq., or bearer, Five pounds (5*l.*). Thomas E. Ollis'—was a good and genuine order for payment of the said 5*l.*, and of the value of 5*l.*, by means of which false pretence the said T. E. Ollis unlawfully obtained a cheque or order for the payment of

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money of the value of 3*l.* from the said H. F. Ramsey, with intent to defraud, whereas in truth and in fact the said certain paper writing was not of the value of 5*l.*, as he the said T. E. Ollis well knew at the time when he did so falsely pretend as aforesaid, against the form of the statute, &c."

H. F. Ramsey deposed as follows: "On Saturday, July 1, the prisoner asked me to lend him 2*l.*, which I did. On the Wednesday following I went to his office, and asked him to return me the 2*l.* I had lent him. He wrote the cheque produced" (verbatim as in indictment) "for 5*l.* in my presence, asked me to cash it, saying it would be all right. I, believing it to be a good cheque, gave him my cheque for 3*l.* on the London City and Midland Banking Company, thus deducting the 2*l.* he owed me. I paid the prisoner's cheque in to my account at my bankers, and it was returned marked 'N/S.' I then took it to prisoner, who expressed his surprise. I believe he said his solicitors had paid money into his account. He then offered to write, and wrote out, another cheque for 5*l.*; that also was returned similarly marked. I should not have given him my cheque for 3*l.* had I not believed that he had a current account at the Birkbeck Bank."

It was proved that in July, 1899, the balance to the defendant's credit at the Birkbeck Bank was only 3*s.* 10*d.*; that the account had been an active running account, but had ceased to be such two or three years previously; that the account was not closed on July 5, 1899, but no money had been paid in after March 31, 1896.

It was proved that on May 25, 1899, the defendant had been adjudged bankrupt.

It was proved that the firm of solicitors referred to by the defendant did not hold any money belonging to the defendant in June and July, 1899, or since. He would have been entitled to 183*l.* commission on the sale of a hotel, if it had taken place, but the sale had not taken place.

The defendant gave evidence, and stated that in drawing the cheques he had relied on obtaining from the solicitors a payment on account of the commission note, that had he not believed they would have made him an advance he would

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not have drawn the cheques, and that he had no intention to defraud.

The recorder directed the jury that the defendant, in making and giving the cheque in the circumstances stated, thereby made a representation that the cheque was a good and valid order for the amount inserted in it, and that if at the time he so made and gave the cheque he had only a colourable account at the bank on which it was drawn, and no available assets to meet it, and had no authority to overdraw, and knew that the cheque would be dishonoured on presentation, and intended thereby to defraud, they would be justified in finding him guilty, but that if at the time he gave the cheque he had reasonable expectation that money would be paid in to his account in time to meet it, and bonâ fide believed that the cheque would be cashed on presentation, they might find him not guilty. The recorder laid particular stress on the intention to defraud, directing the jury that it constituted the essence of the charge, and that if upon consideration of the whole of the evidence they found that in making and giving the cheque he had an intention to defraud they must find him guilty.

The jury returned a verdict of not guilty.

The defendant was, on the next day, tried on another indictment alleging three other acts of obtaining money by false pretences on three other cheques—on June 24 and 26, 1899, from William Henry Morris, and on July 6, 1899, from Bertha Lucy Rawlings, all these three cheques being also drawn upon the Birkbeck Bank. Witnesses were called for the prosecution, and counsel then proposed to call H. F. Ramsey to repeat the evidence he had given on the former indictment. The recorder refused to receive the evidence, and directed the jury upon the law as he had done in the previous case. The jury were unable to agree to a verdict, and were discharged.

At the quarter sessions in January, 1900, the defendant was tried again on the indictment upon which the previous jury could not arrive at a verdict. Counsel for the prosecution again proposed to call H. F. Ramsey for the purpose of proving the circumstances in relation to the 5*l.* cheque drawn by the defendant on July 5, 1899, and in support of his contention

that the evidence was admissible relied on the case of *Blake* v. *Albion Life Assurance Society*. (1) The evidence was allowed to go to the jury, and the point as to its admissibility was reserved. The witness H. F. Ramsey gave precisely the same evidence as he had given before on the trial of the first indictment, upon which the defendant had been found not guilty. The recorder directed the jury upon the whole of the evidence as he had done before.

The jury found the defendant guilty.

The recorder had no doubt that the evidence of the witness Ramsey had considerable weight with the jury.

The question for the opinion of the Court was :—

Whether the evidence of the witness Ramsey (above set forth), which was the subject of the first indictment, upon which the defendant had been tried and acquitted, was legally admissible upon the trial of the second indictment for the purpose of proving guilty knowledge.

The case was first heard on March 17 before Lord Russell of Killowen C.J., and Grantham, Lawrance, Wright, and Bruce JJ. A further argument was directed, and took place before Lord Russell of Killowen C.J., and Mathew, Grantham, Wright, Bruce, Ridley, Darling, and Channell JJ.

May 5. *J. Harris Stone* (*W. T. Lawrance* with him), for the defendant. The evidence of Ramsey on the last trial was inadmissible and irrelevant.

[LORD RUSSELL of KILLOWEN C.J. Suppose the defendant had never been indicted and tried in respect of the cheque given to Ramsey: would Ramsey's evidence then have been admissible?]

It would have been inadmissible, for it would have had nothing to do with the case then before the Court. It would have been inadmissible if the defendant had been convicted in respect of the cheque given to Ramsey, and a fortiori it was inadmissible where he had been acquitted. It could not be used as evidence of guilty knowledge, for guilty knowledge in

(1) (1878) 4 C. P. D. 94.

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respect of the cheque given to Ramsey was negatived by the previous acquittal. The only effect the evidence could have would be to cause a prejudice against the defendant. It was inadmissible according to the principle laid down by Lord Herschell L.C. in *Makin* v. *Attorney-General for New South Wales*. (1) The case of *Blake* v. *Albion Life Assurance Society* (2), which was relied on for the prosecution at the trial, is not in point, and *Reg.* v. *Rhodes* (3) is also distinguishable. No case can be found in which acts tending to shew guilty knowledge, other than those for which the defendant was on his trial, have been given in evidence, where the defendant had previously been indicted and tried, and either convicted or acquitted, for the same acts. To admit this evidence is to put the defendant in peril a second time in respect of the same facts. The facts stated by Ramsey could not be evidence of guilty knowledge, for he said the cheque was returned marked "N.S.," i.e., "not sufficient," which shews that the defendant had some money at the bank, and tends rather to negative than to prove knowledge on the part of the defendant that the cheque was not likely to be met.

Sir Sherston Baker, for the Crown. The evidence was admissible as shewing a systematic course of dealing on the part of the defendant. It is a fallacy to suggest that the defendant was put in peril a second time, for the evidence was not, and could not have been, given on the last trial to shew that the defendant was guilty in respect of the cheque given to Ramsey. It was evidence from which the jury might fairly infer knowledge on the part of the defendant as to the state of his banking account at the dates when he drew the three cheques referred to in the indictment on the last trial. The case is substantially covered by the decision of this Court in *Reg.* v. *Rhodes*. (3)

[GRANTHAM J. referred to *Rex* v. *Westwood*. (4)]

[The following authorities were also referred to in the course of the argument: *Rex* v. *Long* (5); *Reg.* v. *Geering* (6); *Reg.*

(1) [1894] A. C. 57, at p. 65.
(2) 4 C. P. D. 94.
(3) [1899] 1 Q. B. 77.
(4) (1831) 4 C. & P. 547.
(5) (1833) 6 C. & P. 179.
(6) (1849) 18 L. J. (M.C.) 215.

v. *Oddy* (1); *Reg.* v. *Roebuck* (2); *Reg.* v. *Salt* (3); *Reg.* v. *Gray* (4); *Reg.* v. *Francis* (5); *Reg.* v. *Cooper* (6); *Reg.* v. *Gilmore*. (7)]

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Cur. adv. vult.

July 2. LORD RUSSELL of KILLOWEN C.J. The question here arises upon a case stated by the learned recorder of Bath, before whom the accused was indicted for obtaining sums of money by false representations, by means of worthless cheques. The trial of the first of these charges took place on October 13, 1899. It appears that on July 1, 1899, Ramsey lent the accused 2*l.* and on the 5th asked him to return it. The accused then wrote out a cheque for 5*l.* and asked Ramsey to cash it, and Ramsey, believing it to be all right, gave him his cheque for 3*l.* The cheque for 5*l.* was dishonoured. In May, 1899, the accused had been adjudicated bankrupt. He had kept an account at the Birkbeck Bank, but that account had been dead, although not closed, since March 31, 1896, nothing having been paid in or drawn out, and on July 5, 1899, his balance there was 3*s.* 10*d.* At the trial the accused said that he expected money to be paid into his banking account by a firm of solicitors. A member of the firm stated that the accused would have been entitled to some 183*l.* commission on the sale of some property, but that the sale had not taken place. The accused was acquitted upon this particular charge. His acquittal may have proceeded upon the ground that the representation was not fraudulently made; or, if fraudulently made, that the prosecutor had not been induced by that fraud to part with his money. On the following day, October 14, the accused was again put upon his trial upon an indictment containing three distinct charges in three several counts, all for obtaining money by means of worthless cheques on the Birkbeck Bank—that is to say, on July 6 he obtained 3*l.* 15*s.* 6*d.* from Bertha Lucy Rawlings, on June 24 1*l.* 10*s.* from W. H. Morris,

(1) (1851) 2 Den. C. C. 264.
(2) (1856) Dears. & B. C. C. 24; 25 L. J. (M.C.) 101.
(3) (1862) 3 F. & F. 834.
(4) (1866) 4 F. & F. 1102.
(5) (1874) L. R. 2 C. C. 128.
(6) (1875) 1 Q. B. D. 19.
(7) (1882) 15 Cox C. C. 85.

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and on June 26 a further sum of 2*l.* from Morris. The jury were unable to agree upon their verdict, and the accused was again put upon his trial upon this indictment, containing the three charges, at the quarter sessions held in January, 1900. At this trial counsel for the prosecution pressed the recorder to admit evidence of the fraud practised on Ramsey, as relevant to the charges then before him, and as negativing any reasonable belief on the part of the accused that there was money at the bank to meet these other cheques or any of them. The evidence was, after discussion, admitted; and Ramsey made precisely the same statement he had made before upon the trial of the first indictment when the accused was acquitted. The only point for our present determination is, whether that evidence was legally admissible on the ground that the facts disclosed in it were relevant to the subsequent charges. It does not appear to have been argued that it was not relevant as shewing guilty knowledge, if it were not inadmissible on the grounds suggested—namely, that the facts sought to be given in evidence had already been given, and that the accused had already been acquitted of the charge to which they related. It is clear that there was no estoppel; the negativing by the jury of the charge of fraud on the first occasion did not create an estoppel; nor is there any question arising upon the maxim "Nemo debet bis puniri pro uno delicto." The evidence was not less admissible because it tended to shew that the accused was, in fact, guilty of the former charge. The point is, was it relevant in support of the three subsequent charges? In the opinion of the majority of the Court, and in my own opinion, it was relevant as shewing a course of conduct on the part of the accused, and a belief on his part that the cheques would not be met. The accused gave cheques on June 24 and 26 which were dishonoured, and, finally, a further dishonoured cheque on July 6, all three cheques having been drawn on the same bank as the first dishonoured cheque was drawn upon. It is impossible to say that all these facts were not relevant as shewing an intention to defraud. The fact of the dishonour of the first cheque might, and perhaps ought to, have been capable of explanation, but it is impossible to say that it was

not relevant. I have had the benefit of reading my brother Bruce's judgment, and have done so with great respect, as it differs in some respects from my own, and it appears to me to go rather to the weight than to the admissibility of the evidence. In my opinion the conviction must be affirmed, and the matter remitted to the learned recorder to be dealt with by him in his discretion.

MATHEW J. concurred with the judgment of the Lord Chief Justice.

GRANTHAM J. read the following judgment:—As my Lord has gone so fully into the facts of this case, I will confine my remarks to what seems to me to be the only legal question for our determination, and the only one argued before us, namely, whether or not evidence given against a prisoner on one charge, on which he has been acquitted, can be afterwards used against him on another charge, not for the purpose of again attempting to get him convicted of the offence of which he has been acquitted, but merely to prove guilt in his conduct on the second charge by reason of his conduct in the first case. In other words, to negative the suggestion of innocency of his conduct in the matter which is the subject of the second charge, by giving evidence of facts, previously given on the first charge, which disprove his suggestion of an innocent mind, and an innocent action, in the second case. Take as an example the case of a man charged with uttering base coin. He is first charged with uttering a base half-crown. He pleads ignorance of its being bad, and that he remembers he took that one half-crown from a stranger on the sale by him of a particular article for half-a-crown. He is acquitted, and is afterwards tried on a charge of uttering another bad half-crown made in the same mould as the last one, having endeavoured to pass it off within five minutes of his uttering the first bad one, and under exactly similar circumstances—say, for example, buying half a pint of ale, and tendering this bad half-crown for it. Can it be suggested that the prosecution could not give evidence of the first uttering, to disprove his anticipated alleged innocence in the second case? What is the difference between that case

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and this? None that I can see. The objection to the admissibility of the evidence has arisen, I think, from an entire misapprehension of the principle of "Non debet bis puniri pro uno delicto." That fundamental maxim of our criminal law means that a man shall not twice be put in peril for the same offence, after a verdict has been returned by the jury, where the verdict has been given, it must be remembered, on a good indictment, on which the prisoner could be legally convicted. How can it be said that this is the same offence as that on which he was acquitted? The indictment charges an entirely different offence. *Rex* v. *Westwood* (1) seems in point. There evidence of finding a coat of prosecutor, or one of his witnesses, in the prisoner's possession was admitted to prove identity of the prisoner, though the prisoner had during the same trial been acquitted of larceny on a charge of stealing it. In fact he was acquitted at the suggestion of the judge, to enable the prosecution to give in evidence the possession of the coat as a means of identification. Again, in *Rex* v. *Birch-enough* (2) it was held that a person having been acquitted as a principal on a charge of murder might be afterwards charged on the same evidence as an accessory before the fact. It was held in another case that evidence given against a prisoner on a charge of a murder, on which he was acquitted, could be given in evidence against him on a charge of burglary arising out of the same transaction.

The real test is, was the first charge the same as that on which the prisoner is being charged again, or, was the evidence necessary to support the second indictment sufficient to prove a legal conviction on the first? If not, the evidence on the first charge can be used again, because it is being used in a different case, and on a different charge.

For these reasons, in my judgment, our answer must be "Yes—the evidence was admissible."

The Lord Chief Justice then read the following judgment of

WRIGHT J. The prisoner was tried on October 13, 1899, upon an indictment which charged in substance that on

(1) 4 C. & P. 547.

(2) (1836) 1 Moody C. C. 477. See now the Accessories and Abettors Act, 1861 (24 & 25 Vict. c. 94), s. 1.

July 5, 1899, he falsely and fraudulently pretended to Ramsey that a draft on a bank for 5*l.* was a good order on a real account, and of the value of 5*l.*, and that by that false pretence he obtained a cheque for 3*l.* from Ramsey. Ramsey was examined as a witness, and he deposed in effect that he advanced the cheque for 3*l.* in the belief that the draft was a good draft on a current account at the bank; that when it was returned marked "N.S." from the prisoner's bank the prisoner expressed surprise, and said his solicitors had paid money into his account; that the prisoner then wrote another cheque, which was also returned. A bank clerk proved that the prisoner's account at the bank had ceased to be a living account for two or three years. It was further proved that shortly before the alleged offence the prisoner had become bankrupt with no assets. The prisoner's solicitor proved that his firm held no money for the prisoner, but that they held for him a commission note, under which he would have become entitled to a commission of 183*l.* on the sale of a hotel, if the sale had been carried through, and so far as can be gathered from the case as stated, it was at the date of the alleged false pretence still uncertain whether the commission would or would not be earned. The prisoner, who was not defended by counsel, gave evidence on oath to the effect that he had relied on being put in funds by a payment on account of this commission. The recorder seems to have directed the jury to the effect that the only question was whether the pretence was made fraudulently or in the belief that money was coming to the prisoner under the commission note, and he seems not to have pointed out to them that, in order to convict the prisoner, they must be satisfied that the cheque for 3*l.* was advanced on the faith of the pretence alleged in the indictment. The prisoner was acquitted.

On the following day, October 14, 1899, the prisoner was tried on another indictment, which charged that he had on July 6 obtained money from one Rawlings, and on June 24 from one Morris, and on June 26 also from Morris, by false pretences similar to that which was alleged in the first indictment.

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The prosecution proposed to call Ramsey to repeat the evidence which he had given at the first trial, but the recorder refused to receive that evidence, and the jury disagreed. On January 8, 1900, the prisoner was tried again on the second indictment, and Ramsey's evidence was again tendered, and was admitted, and the prisoner was convicted of the offences charged in the second indictment. Sentence was postponed, and this case has been reserved on the question whether Ramsey's evidence was legally admissible on the trial of the second indictment.

We have not, on this case, to consider whether the trial, or the evidence, was satisfactory, but only the question of law reserved for our consideration—whether Ramsey's evidence was or was not legally admissible. If we think that the procedure at the trial was unfair to the prisoner, it is competent for us to recommend a pardon, or to intimate that no sentence should be passed.

The first question argued, though not, I think, intended to be raised, nor properly or sufficiently raised by the case as stated, is, whether, on the trial of the indictment for obtaining money by a false pretence from Rawlings and Morris, on June 24 and 26 and July 6, evidence was relevant which was admitted to shew that on July 5 or 6 the prisoner was endeavouring by an exactly similar pretence to obtain money from Ramsey. I think that this question, if it arises, must be answered affirmatively. The evidence tended to shew that the conduct of the prisoner, in tendering drafts on a bank at which he had no living account, was not inadvertent or accidental, but was part of a systematic fraud, extending over a period immediately preceding and following the date of the offence charged; and the case in this respect seems to me to be governed by *Reg.* v. *Francis* (1) and *Reg.* v. *Rhodes*. (2)

The real question is whether this relevant evidence of the false pretence on July 5 or 6 ought to have been excluded on the ground that it was part of the evidence given for the prosecution at the former trial, at which the prisoner was charged with having obtained money from Ramsey on that

(1) L. R. 2 C. C. 128. (2) [1899] 1 Q. B. 77.

false pretence, and was acquitted of that charge. I think that the objection to the admissibility of the evidence was rightly overruled. The reason for this conclusion is that, in my opinion, it is not shewn that the jury at the first trial negatived the making or the fraudulent character of the pretence charged at that trial. The offence charged was not alone the making of that false pretence, but was the making of it and the obtaining of the then prosecutor's money by means of it. It is certainly possible, and, so far as I can gather from the case, I think it is probable, that the jury acquitted on the ground that the prosecutor parted with his money on the faith, not of the pretence alleged in the first indictment, but on the faith of the other representation which was made by the prisoner, and which had some colour in fact, and was not made a ground of the indictment, namely, that he had moneys coming to him from his solicitors. If the jury decided on this ground, their verdict did not negative the falsity of the pretence which is the subject of this case. The only possible ground of objection to the reception of the evidence, assuming it to be relevant, seems to be that there is an estoppel of record, or "quasi of record." An objection in the nature of a plea of "autrefois acquit" cannot of course be maintained, because on either indictment the prisoner could not have been convicted of the offences, or any of them, which were alleged in the other indictment. Nor can there be an estoppel of record or quasi of record, unless it appears by record of itself, or as explained by proper evidence, that the same point was determined on the first trial which was in issue on the second trial. But in this case the record of the first trial would shew no more than a general verdict of not guilty. It would not shew, nor would evidence be admissible to shew, whether the jury acquitted on the ground that, in their opinion, the pretence was not false, or on the ground that though false it was not fraudulently made, or on the ground that the money was not thereby obtained from the prosecutor. Suppose that a person is tried on an indictment for bigamy, and he disputes the fact or the validity of the first marriage; and also the continuance of the life of the first wife, and also the fact of

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the second marriage, and there is a general verdict of not guilty. He is afterwards indicted for bigamy by a third marriage with a different woman. It could not be contended that at the second trial the Crown is estopped by the record from attesting the fact or the validity of the first marriage, or the continuance of the life of the first wife, or (if that became material) the fact of the second marriage. So an acquittal upon indictment for non-repair of a highway binds no right: *Rex* v. *Burbon* (1); *Reg.* v. *Hutchings* (2), per Lord Selborne, who cites *Rex* v. *Burbon* (1) and Buller, N. P. 245, where it is said that an acquittal ascertains no fact, as a conviction does, and in note (*a*) defendant might have been acquitted for many reasons. So it has been held—*Reg.* v. *Dungey* (3)—that an acquittal upon charges of rape, and of assault with intent to rape, is no bar to an indictment for common assault.

It is not necessary to determine how this case would have stood, if at the first trial there had been a special verdict negativing the falsity, or the alleged fraudulent character of the pretence to Ramsey. But even so it seems to me that there would not have been any estoppel according to the limitations of the doctrine of estoppel on the ground of res judicata, as explained by Knight Bruce V.-C. in *Barrs* v. *Jackson* (4), which, notwithstanding the reversal of the judgment on other grounds (5), continues to be a leading authority on this subject: see per Lord Selborne in *Reg.* v. *Hutchings*. (6) "It is," he says, "I think to be collected that the rule against reagitating matter adjudicated is subject generally to this restriction,—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question

(1) (1816) 5 M. & S. 392; 17 R. R. 369.
(2) (1881) 6 Q. B. D. 300, at p. 306.
(3) (1864) 4 F. & F. 99.
(4) (1842) 1 Y. & C. Ch. 585.
(5) (1845) 1 Phil. 582.
(6) 6 Q. B. D. 300, at p. 304.

provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object." (1)

In the present case the use at the subsequent trial of Ramsey's evidence was not an attempt to reopen the question of the prisoner's innocence on the charge on which he had been acquitted, or to defeat the immediate and direct object of the former acquittal on that charge.

Lastly, it may be observed that the defence of autrefois acquit seems never to have been rested on the ground of estoppel. Both that defence, as well as the defence of autrefois convict, has always been rested on the rule that a man shall not be twice put in jeopardy for the same matter—a rule which has not been violated in this case.

BRUCE J. read the following judgment:—The indictment on which the prisoner was convicted contained three counts, each count alleging a separate offence. June 24, June 26, and July 6, 1899, are the dates laid for the several offences. In form there are three separate false pretences alleged in each count, but I think, having regard to the judgments of Kelly C.B. and Pollock B. in this Court, in the case of *Reg.* v. *Hazelton* (2), that the false pretence upon which the jury must be taken to have founded their verdict was a false pretence that the cheque which was passed in each case was a good and valid order for the payment of its amount. In other words, that the prisoner represented that the existing state of facts at the time each cheque was passed was such that the cheque would be met, when he knew at the time that the facts were such that the cheque would not be met. So that the real question for the jury on each count was, whether the prisoner, at the time he passed the cheques in the counts mentioned, believed that the facts were such that the cheques would be met.

We are not told in the case what was the nature of the evidence offered in support of any of the charges in the indictment, save that we are told that a witness, Harold F. Ramsey, gave the same evidence he had given on the trial of the

(1) 1 Y. & C. Ch. at pp. 597, 598. (2) (1874) L. R. 2 C. C. 134.

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prisoner on a former indictment. Now, the question in this case is, whether the evidence of the witness Harold F. Ramsey was admissible, and it becomes a little difficult to decide that question without knowing what was the direct evidence offered in support of the charges in the indictment upon which the prisoner was convicted, and what was the nature of the defence raised by the prisoner.

But it appears to me that enough is stated to shew that the evidence of Harold F. Ramsey was not admissible on the trial of the prisoner on the indictment on which he was convicted, which I will call for shortness the second indictment.

Although it was not stated in terms, I think we are justified in concluding that the three cheques in the second indictment mentioned were all passed by the prisoner on the dates in that indictment mentioned, and were all dishonoured, and further I think we may assume that the defence raised on the second indictment was in substance similar to the defence which we are told was raised on the first indictment, namely, that the prisoner, at the time when each cheque in the second indictment mentioned was passed, believed that the state of facts was such that the cheque would be met.

That defence raised a question the answer to which must have depended upon the knowledge or belief of the prisoner as to the state of his banking account on the respective dates, of June 24, June 26, and July 6.

There may have been evidence given on the trial of the second indictment to shew that the prisoner, on each of the three dates in the second indictment mentioned, must have known that the state of his banking account was such that there was no reasonable probability of the three cheques or any of them being honoured. I assume that such evidence was given, and that the witnesses, Lomath, Boyle, and White, who were called on the trial of the second indictment, gave, on the trial of the second indictment, the same evidence they had given on the trial of the first indictment. That evidence alone may have been sufficient to support a conviction; but that does not concern the question we are asked to consider, which is, whether the statements of the witness Ramsey with reference

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to the issuing by the prisoner of a cheque to him on July 5 were relevant to the question affecting the prisoner's knowledge of the state of his banking account on June 24, June 26, and July 6. I do not think that the transactions of July 5 can reasonably be considered to have any bearing upon the prisoner's knowledge or belief as to the state of his banking account on June 24 and June 26. They certainly had no direct bearing on those questions, and if they are admissible, they are admissible on the ground that they fall within the rule which allows in some cases evidence to be given of facts distinct from, but similar to, the facts on which a charge is based.

It seems to me to be important to bear in mind that the rule to which I have last referred does not render it competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment on which he stands charged, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried: Lord Herschell L.C. in *Makin* v. *Attorney-General for New South Wales*. (1) Of this *Reg.* v. *Oddy* (2) is a good illustration. It was there held that on the trial of an indictment containing counts for stealing and for receiving property knowing it to be stolen, evidence of the possession by the prisoner of other property stolen some time before from other persons was not admissible upon the count for receiving with guilty knowledge. The statute 34 & 35 Vict. c. 112, s. 19, although it lays down a special rule with regard to the evidence admissible in proceedings against a person for having received goods knowing them to be stolen, does not affect the general principle laid down in *Reg.* v. *Oddy*. (2) On the contrary, it shews that a statute was necessary to introduce an exception in the general law with reference to a special class of cases. The case of *Reg.* v. *Holt* (3) is a decision illustrating the same principle.

In *Reg.* v. *Holt* (3) the question was whether A. obtained

(1) [1894] A. C. 57, at p. 65. (2) 2 Den. C. C. 264.
(3) (1860) Bell C. C. 280.

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money from B. by falsely pretending that C. had authorized him to collect the money. It was held that evidence that A. subsequently obtained money from D. by a similar false pretence was inadmissible to shew that he had no authority on the occasion in question.

It is difficult to distinguish *Reg.* v. *Holt* (1) from the present case, for in the present case the questions as to the second and third counts were, whether the prisoner on June 24 and June 26 had obtained money by false pretences from Morris, and in support of these charges evidence was offered and admitted to prove that on July 5 the prisoner had by a similar false pretence obtained an order for the payment of money from Ramsey.

A line of cases has established the rule that when it becomes material to establish that an act charged in the indictment, and proved to have been done, was intentional and not accidental, evidence is admissible of similar acts done by the same person, having no bearing upon, or connection with, the acts charged in the indictment, save that the acts are similar and done by the same person. This rule is sometimes stated, I think inaccurately, to be a rule which admits indirect evidence of this class to prove guilty knowledge. The evidence is, I believe, admissible under the rule I have mentioned only on the ground that it tends to negative mistake or accident. It is quite true that in many cases to negative mistake or accident is to leave no other alternative, but that the act was intentionally done with a criminal intent. But the ground on which this indirect evidence is admissible is that it tends to negative mistake or accident.

When upon a charge against A. for the murder of B. by administering arsenic, arsenic is proved to have been administered by A. to B., and the question arises whether the administering of the poison was by mistake, evidence is admissible that other persons, to whom A. had access, died from the same poison. So where A. is charged with uttering a counterfeit coin knowing it to be counterfeit, and the question is raised whether he knew it to be counterfeit or uttered it by

(1) Bell C. C. 280.

mistake for a genuine coin, the fact that A. had at other times uttered counterfeit coins is admissible.

So on a charge of arson, where the question arises whether the fire was caused by accident or design, evidence that other fires had occurred in other houses which the prisoner had previously occupied is admissible.

In the same way, where a person is charged with obtaining money by falsely pretending that false jewellery was genuine jewellery, and the defence is raised that he mistook the false jewellery for genuine jewellery, evidence is admissible to shew that the accused had previously on other occasions passed off to other persons false jewellery for genuine.

The ground upon which evidence of this class is admissible is that it tends to raise a presumption that the accused person was not acting under a mistake. To quote the words of Lord Coleridge C.J. in *Reg.* v. *Francis* (1), which are cited with approval by Lord Russell C.J. in *Reg.* v. *Rhodes* (2): "It tends to shew that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely that he should be so often, than once, and every circumstance which shews that he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last."

When the real question raised in the present case is accurately stated, I think it becomes clear that the case does not fall within the category of the cases I have mentioned.

In the present case there was no question of accident or mistake, the question was, knowledge or no knowledge of the state of the bankers' account or of circumstances raising a belief in the mind of the prisoner respecting the state of his bankers' account; just as in *Reg.* v. *Holt* (3) the question was, authority or no authority: see per Blackburn J. in *Reg.* v. *Francis*. (4)

There is no doubt a superficial resemblance between the act

(1) L. R. 2 C. C. 128, at p. 132.
(2) [1899] 1 Q. B. 77, at p. 82.
(3) Bell C. C. 280.
(4) L. R. 2 C. C. 128, at p. 130.

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of pretending that a false coin is a genuine coin and the act of pretending that a cheque is a valid cheque when it is not. But the distinction, and it seems to me it is an important one, is this. In the case of the coin the character of the coin is inherent in it: it is the same to-day and every day, a false coin, and its character does not depend upon external circumstances; but in the case of a cheque, which is a genuine cheque (that is, signed by the person by whom it purports to be signed) the validity of the cheque depends upon the state of the bankers' account, or upon arrangements made between the customer and the banker, and which may vary from day to day, and are in no way inherent in the cheque.

Successive acts of passing false coin as genuine, or of putting off false jewellery as genuine, are successive acts of the same character. So successive acts of administering the same kind of poison are successive acts of the same character, and if a mistake is made in administering the poison in the place of food or medicine, the mistake is as to the inherent character of the thing administered, which does not vary, and is the same at the time of the commission of each successive act. But the act of pretending that a genuine cheque is a valid one is in substance a pretence that circumstances exist at the time of the passing of the cheque which justify a belief that the cheque will be met. Such circumstances may exist on one day and not on another, and the fact that such circumstances exist or do not exist on one day have no necessary connection with the question whether such circumstances exist or do not exist on another day. In other words, the successive acts of passing at different dates genuine cheques, falsely pretending that they are valid, are not necessarily successive acts of the same character, because the quality of each successive act depends upon the knowledge of the person passing the cheque of circumstances existing at the time external to the instrument itself, and varying in character from day to day.

Therefore, I think that indirect evidence, based upon transactions other than those charged in the indictment, was not admissible, within the rule which permits such evidence to be given to negative mistake or accident.

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The case of *Reg.* v. *Rhodes* (1) has been spoken of as though it were an illustration of the rule to which I have referred. When the case is carefully examined I think it is plain that the evidence in that case was admitted because it had a direct bearing upon the matter in issue. The false pretence alleged in that case was, that the defendant pretended that he was carrying on a bonâ fide business, when in truth it was a bogus business. The fact that the business was a bogus business could only be proved by shewing the manner in which the business had been carried on; and, therefore, all transactions tending to shew the general character of the business carried on had a direct bearing upon one of the main questions in the case. The principle of that case seems to me to have no analogy to the present.

The case of *Blake* v. *Albion Life Assurance Society* (2) is a case in which it was held that, in order to establish that a particular transaction was fraudulent to the knowledge of the person charged, evidence was admissible to prove that the act in question was one of a series of fraudulent acts having common features. In that case a person acting under the real or assumed name of Howard had induced the plaintiff to pay to the defendant company a sum of money by way of premium to effect a policy of insurance on his life, upon the representation that if he effected the policy he would obtain from the defendant company a loan of money. The plaintiff never did obtain any such loan, and he brought his action against the defendant company to recover back the amount of the premium paid by him, on the ground that it had been obtained from him by fraud, and that there never was any intention on the part of the defendant company to make the promised loan. In order to prove that Howard was the agent of the defendant company, and that the company had obtained the money paid to them by the plaintiff through the fraud of Howard, committed for them and with their knowledge, evidence was admitted to prove a series of similar transactions extending over years.

But the present case does not fall within the rule of the case

(1) [1899] 1 Q. B. 77. (2) 4 C. P. D. 94.

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I have last referred to. The single incident of July 5 cannot be regarded as evidence of a system of fraud.

If, then, the evidence of the transaction on July 5 is not admissible to negative mistake or accident, and is not admissible as evidence of a system of fraud, it is admissible only on the ground that it tended directly to prove the knowledge of the prisoner of the state of his banking account at the dates when the cheques mentioned in the second indictment were issued.

But I think it is obvious that the passing of a cheque by the prisoner on July 5, which was dishonoured, had no bearing upon the question of the knowledge of the prisoner of the state of his banking account on June 24 or 26, and such evidence was I think inadmissible on the charges contained in the second and third counts.

Further, I think such evidence was not admissible on the charge of July 6 contained in the first count, because there is no evidence to shew that the dishonour of the cheque of July 5 was brought to the knowledge of the prisoner before or at the time he issued the cheque of July 6.

But even if this evidence were admissible on the charge of July 6, I think it was clearly not admissible on the charges of June 24 and June 26. The evidence of Harold F. Ramsey was admitted without any restriction, and the jury were not directed that they were to consider it as bearing upon the first count only. The jury, as I understand, returned a general verdict, and if any evidence was improperly admitted on any of the charges, I think the conviction should be quashed. No doubt in cases where a general verdict has been given, and in the opinion of this Court the evidence adduced has been insufficient to support the charge on one count, and sufficient to support the charge on another, it may be right to quash the conviction on one count only, and to uphold the conviction on the other. But where evidence which was admissible on one count only has been admitted generally, I do not think that such a course can be safely pursued, because it is impossible to know what effect the admission of such evidence may have had upon the minds of the jury.

I therefore think that the evidence of the transaction of July 5 was not admissible on any of the counts of the second indictment, and that the conviction should be quashed; and even if the evidence of the transaction of July 5 should be held to be admissible as bearing on the first count, yet, as it was admitted generally, and the jury were not directed to consider that evidence in connection with that count alone, I should still be of opinion that the conviction should be quashed.

On the question, whether, if the evidence of Ramsey were admissible on other grounds, it ceased to be admissible on the ground that the defendant had been acquitted of the charge contained in the first indictment, I entertained during the argument considerable doubt, but on consideration I am of opinion that that objection cannot be maintained. I have had the advantage of reading the judgments of Wright and Channell JJ., and on the last-mentioned point I agree with the opinions expressed by them.

RIDLEY J. I have read the judgment which has been delivered by Bruce J., and I agree with it, and do not think that I can usefully add anything further.

DARLING J. read the following judgment:—It appears to me that this evidence of Ramsey's would certainly have been admissible in the first instance on the trial of the indictment on which the defendant was convicted—although in itself capable of sustaining another charge against him of a criminal offence—that is, had there not been the former trial, in the course of which this evidence had already been given, I think it was material, for it went some way to shew that the defendant knew he had no assets at the bank on which he gave a cheque, as this had already been brought to his notice in regard to another cheque given by him but a very short time before. This evidence had, however, been given in the first trial, and it is said that therefore it was not again admissible, on the ground stated in the case reserved. This is in effect to state that this case comes within the rule "Nemo debet bis puniri pro uno delicto," a rule which applies equally in civil

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actions, under the form, "Nemo bis vexari debet pro eâdem causâ." This rule is the foundation of the pleas in bar known as "autrefois acquit" and "autrefois convict."

Now to this indictment, on which the defendant was convicted, it would not have availed him to plead either of those pleas, and to have supported them by evidence of the trial in Ramsey's case. Had only the evidence given on the trial of Ramsey's case been given on the trial of this indictment, there would have been no evidence to go to the jury, for there would have been none of the giving of the cheque, or making the false pretences charged as a crime by this indictment.

It seems to me, therefore, that by the admission of this evidence the defendant was not "bis vexatus," for I feel sure that those words are not to be understood as meaning that a man is not to be more than once annoyed by the same evidence. I think they mean that he is not to be by legal process twice exposed to the risk of being found guilty of the same crime, or the same tort, or liable twice to pay the same debt, be it to the State or to his fellow citizen.

To hold otherwise seems to me to rule that evidence which has been given once shall never be produced again against the same defendant; yet it is plain that up to a certain point the evidence must often be the same, although the defendant is accused of wrongs done to two distinct persons, and that in different suits or forensic proceedings.

It seems to me impossible to say that the evidence, of which a summary has been given by my Lord, was irrelevant to the issue; but I think it might well have produced a prejudice against the defendant out of all proportion to its real weight and importance. The recorder might therefore, I think, well have suggested to the counsel for the prosecution that he should not press the evidence on the Court. But as a matter of law I am of opinion that the evidence of Ramsey was admissible.

The Lord Chief Justice read the following judgment of

CHANNELL J. The recorder of Bath has stated this case for the opinion of the Court of Crown Cases Reserved upon a

question of the admissibility of certain evidence tendered and received by him, but he appears to have intended to raise by the case one point only, namely, whether, assuming the evidence to have been otherwise admissible against the prisoner upon the charge on which he was being tried, it was rendered inadmissible by reason of the evidence having been previously given in support of a former indictment, upon which the prisoner had been acquitted. In my opinion this is no ground for holding the evidence to be inadmissible. In order to consider and deal with the objection to the evidence which is raised it is necessary to consider the ground upon which, if at all, the evidence could be admitted.

It is an elementary principle of criminal law that a prisoner can only be convicted on a criminal charge by evidence bearing directly on that charge, and that it is inadmissible to endeavour to support the charge by shewing that the prisoner has committed other similar offences, and is therefore likely to have committed the one with which he is charged.

I know of no exception to this rule, but nevertheless there are cases where evidence of transactions other than those the subject of the indictment can be given, because those transactions have a direct bearing upon one of the questions at issue on the trial of the particular indictment. Where the proof of an offence involves the proof of such matters as intent to defraud, or guilty knowledge, or the like, the evidence of other transactions is often the only evidence by which that essential part of the offence can be proved. If the transaction is an isolated one a jury would seldom be satisfied of the prisoner's guilt. A charge of embezzlement, founded on a failure to account for one sum out of many, would generally fail, and a charge of uttering counterfeit coin founded on the passing of one coin, with no proof of the possession by the prisoner at any time of other counterfeit coins, would generally fail also. In such cases evidence of other transactions is admitted, not for the purpose of shewing that the prisoner committed other offences, but for the purpose of shewing that the transaction the subject of the indictment was done with the intent to defraud, or with guilty knowledge, as the case may be. Such

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evidence is admitted, not because it tends to shew that other offences have been committed, but notwithstanding that, in the particular case, it may happen to do so. It seems to me to be a mistake to say that if the other transactions have been the subject of an indictment, the prisoner is being twice vexed for the same matter by the proof of them on a subsequent indictment being allowed. It may be true that the proof of other transactions may prejudice the prisoner, but it does so equally whether those transactions happen to have been the subject of another indictment or not.

Judges should be, and I believe generally are, careful not to allow proof of other acts of the prisoner besides those the subject of the indictment to be given, unless those facts have a clear bearing on some issue raised by the indictment, but if they have such a bearing I am unable to see how their proof becomes inadmissible because they have already, for a different purpose, been considered by another jury. Take as an illustration a case of counterfeit coin. Suppose a man passes a counterfeit half-crown, and on his trial, there being no proof of his having possession of any other counterfeit coin, the jury acquit. It is subsequently discovered that either before or after the passing of the one half-crown (in my opinion it matters not which) he has passed another counterfeit half-crown, and upon comparison of the two base coins they appear cast in the same mould. If tried for the secondly discovered case of uttering, the fact of the other uttering would be most cogent evidence, and the fact that when that other case was supposed to be an isolated one a jury had acquitted would neither detract from the weight of the evidence or in any way affect its admissibility, for the prisoner would not be being tried again for the offence of which he had been acquitted, but for a different offence, in respect of which the evidence given in the former case, or some of it, would be relevant.

The objection in this case is to the evidence of Ramsey. The mere fact that he had given evidence in the case in which the prisoner had been acquitted of course does not make his evidence inadmissible. No one suggests that the evidence of the bankers' clerk, the solicitor, and the trustee in bankruptcy,

given also in the former case, was inadmissible. If the evidence of Ramsey were wanted to shew that the prisoner had committed a fraud on Ramsey, that not being the fraud for which he was then indicted, it would be inadmissible, but it is not wanted for that purpose, but to shew if possible that frauds were committed on Rawlings and Morris. Its admissibility in my opinion depends solely on whether it was relevant for that purpose. The main question on each indictment was whether the prisoner knew that the cheque he drew would not be honoured. If he did, the fraudulent intent was proved. If he drew several cheques, and knew that some of them were dishonoured, then, as to any cheques which he subsequently got cashed, there was cogent evidence of a fraudulent intent.

I doubt whether the transaction with Ramsey was relevant on the subsequent indictment, but I am prepared to defer to the opinion of the majority of the Court as to the mode in which the case should be dealt with, desiring only to express my clear opinion that, if the evidence was otherwise admissible, it is not the less so by reason of the former acquittal.

Conviction affirmed.

Solicitors for prosecution: *Whitakers & Woolbert, for Collins, Bath.*

Solicitor for defendant: *Tuttell, Bath.*

P. B. H.

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Aug. 6.

[IN THE COURT OF APPEAL.]

BARNETT *v.* HOWARD.
UNION BANK OF LONDON, GARNISHEES.

Husband and Wife — Married Women's Property Acts — Wife's Contracts during Coverture—Judgment after Cessation of Coverture—Separate Property—Restraint upon Anticipation—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.

By the Married Women's Property Act, 1893, s. 1, "Every contract hereafter entered into by a married woman . . . . (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to; Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

A married woman, who was possessed of separate property the income of which she was restrained from anticipating, entered into a contract, and was subsequently divorced. Judgment having then been obtained against her, it was sought to enforce it, by means of a garnishee order attaching income which had accrued due to her from this property subsequently to the divorce :—

Held, that this income was protected by the proviso to the section, and could not be attached.

APPEAL from the decision of Bucknill J. at chambers, setting aside a garnishee order made by a master.

G. A. Howard was first married to one J. H. Charter, and after his death to one F. Howard on November 28, 1894. This marriage was dissolved on the petition of the husband, the decree nisi being made on July 12, 1899, and the decree absolute on January 22, 1900.

On April 12, 1900, a writ was issued by Sydney Barnett against G. A. Howard, claiming against her as acceptor of two bills of exchange dated October 8, 1896, each payable two

years and nine months after date, which had been dishonoured on presentation.

On June 12, 1900, Barnett obtained judgment against G. A. Howard in the following terms:—

"It is this day adjudged that the plaintiff recover against the defendant 261*l.* 9*s.* 2*d.* and costs to be taxed, such sum and costs to be payable out of her separate property as hereinafter mentioned and not otherwise; and it is ordered that execution hereon against the said G. A. Howard be limited to such property as during her coverture was the defendant's separate estate not subject to any restraint against anticipation, unless, by reason of s. 19 of the Married Women's Property Act, 1882, the property shall be liable to such execution notwithstanding such restriction, and to any property which she may, after October 8, 1896 (being the date when she entered into the contracts sued on), while discovert, be possessed of or entitled to; provided that nothing in this judgment contained shall render available to satisfy the said sum and costs or any part thereof any separate property which, at the said time of entering into the said contracts or thereafter, she was or may be restrained from anticipating."

It appeared that the whole of G. A. Howard's income was derived from the residuary estate of one James Phillips, which, by his will proved on November 15, 1882, he left to trustees "upon trust to pay the whole annual produce and income thereof unto the said G. A. Charter for the term of her natural life for her separate use, free from the debts, control, interference, and engagements of the said J. H. Charter, or any husband with whom she may hereafter intermarry, and so that she shall have no power to alienate or anticipate the same or any part thereof."

In May, 1900, G. A. Howard opened an account with the Union Bank of London, and on May 18 a sum of 200*l.*, being part of the income derived from the above-mentioned residuary estate, which had come to the hands of the trustees of the will, was paid to her account, and on May 29 a further sum of 175*l.*, also consisting entirely of income derived from the said residuary estate, was also paid in to her account. Part of

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these sums of 200*l.* and 175*l.* accrued due to G. A. Howard on or prior to January 22, 1900, and the remainder between that date and April 12, 1900.

The Union Bank of London admitted that there was standing in their books on June 30, 1900, the sum of 83*l.* to the credit of G. A. Howard, being the balance of the sums of 200*l.* and 175*l.* unexpended by her. On June 30, 1900, Barnett obtained a garnishee order from the master in chambers attaching all moneys due from the Union Bank of London to G. A. Howard to answer the judgment obtained by him on June 12. This order was made absolute on July 7.

From this order the garnishee and the judgment debtor appealed to the judge at chambers, and on July 17 Bucknill J. set aside the order. (1)

Barnett appealed.

Hon. E. Macnaghten, Q.C., and *Buckmaster*, for the appellant. The judge was wrong in discharging the garnishee order. He misunderstood the effect of the proviso to s. 1 of the Married Women's Property Act, 1893. That Act was passed for the benefit of creditors of married women, and the effect of s. 1 is that henceforward contracts entered into by a married woman bind all separate property which she has at the time of the contract, or becomes entitled to during the coverture, and is enforceable against all property which she afterwards

(1) By the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1, "Every contract hereafter entered into by a married woman otherwise than as agent,

"(*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

"(*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

"(*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

possesses or is entitled to while discovert. The proviso to the section only affects the first two clauses of the section, and protects from liability during her marriage all property which she is restrained from anticipating. To hold otherwise would be to make the proviso repeal clause (*c*) of the section. The proviso only applies to separate property, and this expression is only used in clauses (*a*) and (*b*) of the section. Clause (*c*) speaks of all "property" which she may thereafter while discovert be possessed of or entitled to, and is therefore not affected by the proviso. A woman who has become discovert has no separate property. It can only exist during coverture, and the proviso can, therefore, have no operation on the property of a woman whose marriage has come to an end. If it had been intended to apply in such a case, the word "property," and not the expression "separate property," would have been used.

It was never intended that the Act should take away the power already possessed by the creditors of a married woman of reaching money, the produce of separate property, which she was restrained from anticipating, but which had already come into her hands.

Danckwerts, Q.C. (*Rayner Goddard* with him), for the respondent. The words of the section are clear, and protect from liability for the contracts of a married woman all property which either at the date of the contract or at any time thereafter was separate property which she was restrained from anticipating. The fact that the coverture has come to an end cannot alter the nature of this property, and make it liable in spite of the proviso for her contracts.

A. L. SMITH L.J. This is an appeal from the decision of my brother Bucknill, setting aside a garnishee order which had been made by the master. The question really turns on the meaning to be given to the proviso to s. 1 of the Married Women's Property Act, 1893. The plaintiff got judgment against the defendant, a lady, who had been a married woman, but who in January, 1900, was divorced. The judgment was obtained on June 12, 1900, on a contract which had been

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A. L. Smith L.J.

entered into by the defendant on October 8, 1896, while she was under coverture. The judgment was drawn up for the most part in the form settled by Fry L.J. in *Scott* v. *Morley* (1); but the last part of it was drafted so as to carry out the proviso to s. 1 of the Married Women's Property Act, 1893. At the date the contract was made the lady had property which was subject to a restraint upon anticipation, and the question now is what effect that judgment is to have against her. Unless the judgment has the effect which the plaintiff claims for it, it is plain that he cannot attach the money in the bank by a garnishee order. It is necessary, therefore, to inquire what is the true meaning of the section. It is no part of my business, and I protest against being asked, to read the Act as if it contained something which it does not contain, merely because, if I do not read some words into it which are not there, it will have an effect which it is said it was not intended to have. I agree that the Act was partly in favour of the creditors of a married woman, but it seems to me that it is also partly against them, and it is no part of my duty to read words into the Act which will make it entirely in their favour. The section says: "Every contract hereafter entered into by a married woman . . . . (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to." If the section stopped there, there would be no difficulty at all about it; but then comes the proviso, which I am unable to construe in the way for which the plaintiff's counsel contends. It runs thus: "Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." I cannot cut that down to

(1) (1887) 20 Q. B. D. 120, at p. 132.

mean that it only applies during coverture. "At that time or thereafter" clearly means at the time of entering into the contract, or at any time afterwards; and if, therefore, at the time of entering into the contract or at any time thereafter she has separate property which she is restrained from anticipating, that property cannot be made available to satisfy any liability or obligation arising out of such contract. In my opinion, the property now in question—the money at the bank—falls clearly within the words of the proviso, and I think, therefore, that Bucknill J. was right, and that this appeal must be dismissed.

VAUGHAN WILLIAMS L.J. I do not see my way to differ from that conclusion, but I am far from thinking that the words of the section are clear. I am, however, unable to accept the argument based on the phrase "separate property." That construction of the section can only, I think, be adopted if the Legislature had intended that after coverture had ceased judgment should go against a woman who had been married at the time of the contract as if she had always been a single woman, and not in the form in which judgment is given against a woman on a contract entered into by her while she was a married woman.

I wish, however, to point out one or two things about the section which seem to me to have been overlooked. The proviso to s. 1 of the Married Women's Property Act, 1893, is, it should be noted, to the whole section, and not merely to clause (*c*) of the section. On looking at the section as a whole, two different expressions are found: the word "property" used in clause (*c*) and the phrase "separate property" used in clauses (*a*) and (*b*). Now, what is the reason and effect of using those different expressions? The proviso says that nothing in the section is to render available to satisfy any liability under the contract "any separate property" which she is restrained from anticipating. The words "at that time or thereafter" in the proviso must, I think, have the same meaning as the same words in clause (*b*)—that is to say, at the time of entering into the contract or thereafter; but,

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considering that the phrase "separate property" is only used in clauses (*a*) and (*b*), and is not used at all in clause (*c*), I feel considerable doubt whether we ought to give such an effect to the words "separate property" in the proviso as to make it apply to separate property which was once fettered by a restraint upon anticipation, but which has actually been received by the defendant. I have great doubt whether the operation of the proviso ought not to be limited to the clauses (*a*) and (*b*) of the section by the use of the words "separate property" in the proviso.

Appeal dismissed.

Solicitor for appellant: *B. Barnett.*
Solicitors for respondent: *R. S. Taylor, Son & Humbert.*

A. P. P. K.

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April 30: *June* 15, 22.

[IN THE COURT OF APPEAL.]

In re PLUMMER.

Bankruptcy—Father and Son—Voluntary Settlement—Purchaser for Value—Gift of Money—Advancement—Business, Purchase of—Earmarking Gift—Alienation of Gift—"Settlement of Property"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 47, 168.

In May, 1896, a trader, then in good credit, sold his business to a limited company promoted by him for the purpose of purchasing it. He and his son took between them practically the whole of the shares issued by the company, and substantially the whole of the debenture issue was taken by the father himself. The company was unsuccessful, and, in May, 1898, went into voluntary liquidation; whereupon, with a view to preserving the father's credit, he and his son entered into an arrangement by deed with the company, by its liquidator, and the company's ascertained creditors, whereby the son purchased the company's business in consideration partly of a sum in cash and partly of payment by him of the debts due to the ascertained creditors secured by joint and several promissory notes of the father and son; and, by way of further consideration, the father surrendered his debentures and a private debt due to him from the company. The father and son also covenanted to pay off any then unascertained creditors of the company, and to indemnify the company and its assets against all claims in respect of the business, and the father covenanted with the son that all moneys paid by him, the father, under

the arrangement, and all property thereby handed over by him to the son, should be treated "as an absolute and irrevocable gift" from him to the son.

The son thereupon took over the business, and carried it on with such success that, by means partly of his earnings and partly by contributions from the father, the whole of the purchase-moneys and debts payable under the arrangement were discharged. Subsequently, in March, 1899, the father became bankrupt; whereupon the trustee in bankruptcy applied to have the transfer of the business to the son under the arrangement of 1898 declared void as a "settlement" within s. 47 of the Bankruptcy Act, 1883:—

Held, by the Court of Appeal (affirming Wright J.), that the mere fact that the business had been acquired by the son partly by means of money obtained from or paid by the father was not sufficient to make the transfer a "settlement" within s. 47.

"Settlement" in s. 47 of the Bankruptcy Act, 1883, means such a conveyance or transfer by the donor as contemplates the retention of the property by the donee, either in its original form or in such a form that it can be traced, and does not extend to a conveyance or transfer of property which cannot be traced, as, for instance, where there is a gift of money to be employed in a business or in the purchase of a business, and the money is so employed or spent, the business itself not being settled.

In re Player, Ex parte Harvey, (1885) 15 Q. B. D. 682, approved of.

The principles stated in *In re Vansittart*, [1893] 1 Q. B. 181; *In re Tankard*, [1899] 2 Q. B. 57, 60, 61, approved of.

THE bankrupt, William Plummer, formerly carried on drapery businesses in Lewisham and Brixton and elsewhere in London and the provinces, under the style of "Plummer & Company."

In May, 1896, being then in good credit and reputed to be a man of wealth, he caused to be registered under the Companies Acts a company called "Plummer's Stores, Limited," for the purpose of acquiring and extending the Lewisham and Brixton businesses. The agreement under which the two businesses were sold to the company stated the consideration as 20,000*l.*, payable in cash, shares, and debentures. Only a small number of the shares were applied for by the public, so that practically no cash was forthcoming, and William Plummer himself took the larger part of the purchase-money in fully-paid shares. He was the chairman of the company, and his son, Frederick George Plummer, was one of the directors. Out of a total issue of 16,534 1*l.* shares W. Plummer held 8364 fully paid shares, and F. G. Plummer also held 5051 fully paid shares.

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Debentures of 50*l.* each were issued by the company, the whole or the greater part of which were held by or belonged to W. Plummer himself. The debentures constituted a floating charge over the whole of the property of the company.

From May, 1896, to May, 1898, the businesses were carried on by the company, though at a considerable loss, and on May 26, 1898, William Plummer, finding that the businesses could not be continued with advantage, commenced an action in the Chancery Division against the company, on behalf of himself and all other the debenture-holders, for a declaration that the debenture-holders were entitled to a first charge on the property and assets of the company, for an account, foreclosure, or sale, and the appointment of a receiver and manager. On May 27, 1898, an order was made in that action appointing William Nicholson receiver and manager on behalf of the debenture-holders, and on June 6, 1898, the company passed an extraordinary resolution for a voluntary winding-up, Nicholson being appointed liquidator. On July 2, 1898, judgment was pronounced in the action, making a declaration as asked, directing the usual accounts and inquiries, and giving liberty to apply as to a sale.

As soon as the creditors of the company became aware of the appointment of a receiver and manager on behalf of the debenture-holders, many of them communicated with William Plummer respecting their debts, stating that they looked to him personally for payment. Thereupon, being anxious to maintain his good credit, he, on June 2, 1898, sent out to all the creditors a circular dated from the Lewisham premises informing them that, as a debenture-holder, he had taken the necessary steps for the appointment of Nicholson as receiver and manager, and for placing the company in voluntary liquidation; that he was by far the largest debenture-holder, and had reluctantly come to the conclusion that the company could not, as then constituted, continue its business without risk to the interests of the creditors; that he had every reason to believe the assets of the company were of sufficient value to provide for the payment of the debenture-holders and creditors in full, but that if, contrary to his expectation, they should prove

insufficient, he should allow the trade creditors to be paid in priority to the debentures he himself held.

The receiver and liquidator advertised the company's business for sale, but without success; and ultimately, on July 13, 1898, an agreement in writing was entered into between the company of the first part, Nicholson, the receiver and liquidator, of the second part, William Plummer of the third part, and his son, Frederick George Plummer, of the fourth part. The agreement was under the company's seal, and was signed by each of the other parties. After reciting (amongst other things) that W. Plummer was the holder of 5000*l.* worth of debentures, and was also the owner of a further 3000*l.* worth deposited with Barclay & Co. as security for advances made by them to the company to the extent of 3500*l.* and interest, and that W. Plummer, on the non-payment of that amount by the company to the bank, would become a creditor of the company in respect of the said 3500*l.* and interest in addition to the sum of 688*l.* due from the company to him in respect of other advances; and that W. Plummer was the holder of 8364 shares in the company; and that F. G. Plummer was also the holder of 5051 shares: it was agreed that the receiver should sell and F. G. Plummer should purchase all the company's property, goodwill, stock-in-trade, assets, and effects at Lewisham (not at Brixton or elsewhere) which were included in or charged by the said debentures. Then it was agreed that part of the consideration should be 13,000*l.* (that sum including 4000*l.* for the goodwill, the leases of the premises, and the fixtures), of which 500*l.* was to be paid on the signing of that agreement, 2000*l.* on the sanction by the judge of the agreement and possession being given to the purchaser, and 600*l.*, or such further or other sum as might be necessary, on the like sanction and possession being given, to enable the receiver to pay and discharge certain preferential debts due for rent, &c., at the time of his appointment, and also such further or other sum constituting the balance of the purchase-money after an adjustment of accounts between the receiver and the purchaser. A further consideration for the purchase was also agreed to be the payment by the purchaser to the trade creditors of the company of a

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sum of 5700*l.*, or such further sum as might be required to discharge the trade creditors; or, in the alternative, the purchaser was to obtain the consent of all such creditors to the withdrawal of their claims. Then, in further part consideration, W. Plummer thereby withdrew all claims in respect of 3000*l.* of the 5000*l.* worth of debentures held by him, and thereby released the company and the receiver and liquidator from the payment of that sum and all interest thereon. Then, in further part consideration, W. Plummer and F. G. Plummer thereby respectively undertook and agreed to pay and discharge the debts of the trade and other creditors due from the company which were or might be then unknown to the receiver; and W. Plummer also thereby withdrew his claims as a creditor against the company and the receiver and liquidator for the said sums of 3500*l.* and 688*l.*, or any other claim he might have; and as further part of the consideration the purchaser, F. G. Plummer, gave up all claims (if any) which he then had against the company or the receiver or liquidator in respect of any sum due to him as a debt of the company, and released the company and receiver and liquidator therefrom.

The purchase was to be completed on July 30, 1898. Then the purchaser was to indemnify the company and its assets against all actions, claims, &c., in respect of the Lewisham business. Then, after numerous other provisions, it was, in conclusion, stipulated that the agreement was conditional upon the same being approved by the judge.

That agreement was duly confirmed by an order of the Court of August 6, 1898, which provided that the debt due to Barclay & Co. should be paid off out of the first cash coming in in respect of the purchase-money. The agreement was then followed by a deed (under seal) of covenant and indemnity dated August 15, 1898, and made between W. Plummer of the first part, F. G. Plummer (described as "a director of Plummer's Stores, Limited") of the second part, W. Nicholson of the third part, the several companies and firms (being creditors of Plummer's Stores, Limited) whose names and seals were set and affixed to the schedule thereto, or who

might otherwise assent in writing to the present deed, and who were thereinafter called "the creditors," of the fourth part, and Frederick Beecroft, trustee for the creditors and thereinafter called "the trustee," of the fifth part. After reciting the various facts already recited in and leading up to the agreement of July 13, 1898, and also reciting in detail the agreement itself, and further reciting that at a recent meeting of the creditors of the company, Plummer's Stores, Limited, it was agreed that the creditors should accept the amount of their respective debts in full to be secured by the joint and several promissory notes of the said W. Plummer and F. G. Plummer, payable by four instalments, and that accordingly the said W. Plummer and F. G. Plummer had that day delivered to the creditors, parties thereto of the fourth part, their joint and several promissory notes payable as aforesaid to the creditors: it was witnessed that in pursuance of the said agreement of July 13, 1898, and of the stipulations and conditions therein contained, the said W. Plummer and F. G. Plummer thereby covenanted with the said W. Nicholson, as receiver and also as liquidator of the company, that they jointly and severally indemnified the company and its assets, and also the said W. Nicholson as receiver and liquidator, against all actions, claims, &c., in respect of the Lewisham business, and also to pay all costs incurred in connection with the present arrangement. The deed then proceeded as follows: "And for the considerations aforesaid the said W. Plummer hereby covenants and agrees with the said F. Beecroft, and with each of the creditors, that all moneys which he the said W. Plummer has paid or will have to pay pursuant to the said agreement of July 13, 1898, or in respect of the said costs or of the covenants herein contained, and all goods, assets, property, and effects of whatsoever kind which he has handed over to his son the said F. G. Plummer, shall be treated as and the same is hereby given to the said F. G. Plummer as an absolute and irrevocable gift from him the said W. Plummer, not only for the considerations aforesaid, but also for natural love and affection; and the said W. Plummer hereby covenants and agrees that he will not at any time hereafter sue or cause

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to be sued, or take any proceedings of any nature or kind whatsoever, against the said F. G. Plummer with the view of recovering or seeking to recover any of the assets, estate, effects, or property by the said agreement of July 13, 1898, purported to be purchased by the said F. G. Plummer; and the said W. Plummer hereby agrees and declares that the said sum and sums and all assets and effects purchased shall belong to and become the absolute property of the said F. G. Plummer."

Then the deed contained a covenant by W. Plummer and F. G. Plummer that, while the said promissory notes remained unpaid, neither of them would execute any charges on the property to be transferred to F. G. Plummer under the agreement of July 13, 1898, nor dispose of any of the goods of the said business except in the ordinary way of business without the consent of the trustee; also a covenant by F. G. Plummer that he would not, so long as the said promissory notes remained unpaid, enter into any partnership without the written consent of the trustee; and finally a covenant by W. Plummer and F. G. Plummer that in the event of any of the said promissory notes remaining unpaid, or of breach of any of their covenants therein contained, then the whole of the moneys secured to the creditors by the said promissory notes should immediately become due, and the creditors should be at liberty to resort to their respective rights under them, and to take proceedings accordingly against W. Plummer and F. G. Plummer either jointly or severally.

From the date of that deed F. G. Plummer proceeded to carry on the business, and did so with considerable success. It appeared that the consideration agreed to be paid by F. G. Plummer for the purchase of the Lewisham business was not fixed by a reference to its value, but to meet his father's wish that, in order to preserve his own credit, the company's liabilities should be paid in full.

From the evidence of the liquidator it appeared that he estimated the realization value of the Lewisham business at not more than from 7000*l.* to 8000*l.* Eventually, as appeared from the evidence of F. G. Plummer, all the moneys payable

under the agreement and the deed were duly paid by instalments by the Plummers, father and son, the father contributing in all some 5500*l.*, partly in cash and partly by the surrender of the whole of his debentures, and also releasing his debt of 688*l.*, and the son contributing about 5000*l.* in cash out of the profits he made from time to time in carrying on the business.

Subsequently to these transactions William Plummer incurred large losses over certain other undertakings in which he was interested, and on March 25, 1899, a receiving order was made against him. On March 29, 1899, he died, and in May following a trustee was appointed in the bankruptcy.

On February 10, 1900, the trustee served F. G. Plummer with a notice of motion in the bankruptcy, asking that it might be declared that the transfer to F. G. Plummer of the Lewisham business, effected in pursuance of the agreement of July 13, 1898, and the deed of August 15, 1898, and the payments made and releases given by the bankrupt for the purpose of effecting the same, constituted a "settlement" by the bankrupt upon the respondent, F. G. Plummer, of the property comprised in the agreement of July 13, 1898, within the meaning of s. 47 of the Bankruptcy Act, 1883, and that the same was therefore void as against the trustee in bankruptcy; or that, in the alternative, it might be declared that all gifts and payments made, and all claims released by the bankrupt to or on account or for the benefit of the respondent, F. G. Plummer, for the purpose of effectuating the said transfer, were void as against the trustee in bankruptcy; and that all such orders for transfer to the applicant of the said property, or for payment to him of the sums representing the value of the gifts and payments made and claims released as aforesaid, might be made, and all such accounts and inquiries directed, as the Court might think fit.

The motion was heard by Wright J. on April 30, 1900.

G. I. F. C.

Younger, Q.C., and *A. H. Dennis*, for the applicant, the trustee in bankruptcy.

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Herbert Reed, Q.C., and *Muir Mackenzie*, for the respondent, F. G. Plummer.

WRIGHT J. This was certainly a proper case to investigate, especially in view of the admissions made by the respondent, F. G. Plummer. But, so far as I am able to form a conclusion in the matter, I think there is not sufficient ground for declaring the respondent liable for the sum claimed under the notice of motion, or any part of it. It is true that the respondent has got the business, and that the business has been paid for to the extent of some 5500*l.* by his father, the bankrupt, partly in cash and partly by the surrender of debentures, and that the respondent himself has only paid about 5000*l.* towards it. This results from the arrangement made by the two documents dated respectively July 13 and August 15, 1898, which seem to me to be parts of one transaction, the main object of which was that the business of the father should not be discredited by any failure to pay off any of the ordinary trade creditors, though no doubt it was also his intention to benefit his son, the respondent, in some way—perhaps to compensate him for the practical loss of the shares held by him in the company.

At the time when this arrangement was made there was no idea of bankruptcy at all. The arrangement was perfectly proper and was made in good faith at the time. However, bankruptcy supervened within two years, and the question now is, What is the position of things? It is submitted, I understand, on behalf of the respondent, that the assignment to him by the company cannot be impeached because the bankrupt is not a party for that purpose. But it is argued, on the other hand, that the money paid by the bankrupt, the father, was not paid for valuable consideration, but was really a voluntary settlement for the benefit of his son, the respondent. It seems to me in point of fact that the money was paid on the footing of the deed of August 15, 1898, in consideration of the son having undertaken in part to discharge the liability of the ordinary creditors. In any case there was no great benefit to the son. The amount of the margin is not very

material if the transaction is in good faith and for valuable consideration. It turns out now that the respondent actually paid some 5000*l.* out of his own pocket, and the mere fact that the father helped to buy off the ordinary creditors does not to my mind make the transaction a voluntary one, because there was a substantial consideration for the son's undertaking. The substantial consideration was the son coming under the liability to discharge the claims of the ordinary creditors under the deed of August 15, 1898. I am quite unable to say that the consideration received by the father in respect of which he made his contribution, namely, the son undertaking the liability of paying the ordinary creditors, was so fictitious or unreal as to make the transaction one that should be impeached on the ground that it was a voluntary settlement by the father. I think, therefore, that the application fails, and must be dismissed with costs.

H. L. F.

The trustee in bankruptcy appealed.

Younger, Q.C., and *A. H. Dennis*, for the appellant. The question is whether the transaction carried out by the father and son by means of the agreement of July 13, 1898, and the deed of August 15, 1898, is a "settlement" within the meaning of s. 47 of the Bankruptcy Act, 1883. (1) The appellant submits that it is. The object of the section is to protect the

(1) Sect. 47 of the Bankruptcy Act, 1883, provides (sub-s. 1) that "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof." Sub-sect. 3 provides that "'settlement' shall for the purposes of this section include any conveyance or transfer of property."

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bankrupt's estate for the benefit of his creditors where he attempts to make a voluntary disposition of his property within two years of the bankruptcy. It does not matter what the person receiving the gift does with it when he gets it.

[RIGBY L.J. Supposing a sum of money is given to a son, and he pays his debts with it honourably: why is he to be made to pay it back?]

Sub-s. 3 of s. 47 says that "settlement" shall include "any conveyance or transfer of property"; and under s. 168 "property" includes "money." All that it is necessary to shew, therefore, is that there has been a transfer of money to the son, in which case he must pay it back.

[RIGBY L.J. That is a very long step: he cannot pay "it" back.]

Under the arrangement of 1898 the father has made and given various payments and releases for the benefit of the son, and in considering the meaning of the section the question arises is, "By what amount has the bankrupt's estate been diminished by those payments and releases?" The father's obvious intention in making the arrangement was to enable the son to get the business for himself, and the moneys paid or agreed to be paid by the father were intended as permanent gifts to the son, or for the son's benefit. These payments must, therefore, be regarded as void as against the trustee: *In re Vansittart* (1); *In re Tankard* (2); and being void as against the trustee, they are void altogether as from the date of the bankruptcy, the effect of which is that the property given by the donor reverts to him, and, as his property, vests in the trustee, for the section applies to a transfer of property of any sort: *In re Farnham* (3); *In re Carter and Kenderdine's Contract.* (4) On behalf of the respondent, the son, reliance will probably be placed on *In re Player, Ex parte Harvey* (5), not to be confounded with another case of the same name (6); but the former case has not met with unqualified approval in

(1) [1893] 1 Q. B. 181.
(2) [1899] 2 Q. B. 57.
(3) [1895] 2 Ch. 799, 807–8.
(4) [1897] 1 Ch. 776.
(5) 15 Q. B. D. 682.
(6) (1885) 54 L. J. (Q.B.) 553; 2 Mor. 261.

later cases, for there are observations in the judgment of Lindley M.R. in *In re Farnham* (1), of Vaughan Williams L.J. in *In re Vansittart* (2), and of Wright J. in *In re Tankard* (3), that are inconsistent with it. The effect of the arrangement was to make a voluntary gift to the son of a business increased in value by the fact of the father undertaking to pay off the creditors and debenture-holders.

Herbert Reed, Q.C., and *Muir Mackenzie*, for the respondent, the son. A sufficient answer to the appellant's case is that the money paid by the father to or for the benefit of the son was absolutely spent before the bankruptcy; it is no longer in the son's hands, and cannot now be traced; therefore, according to the authorities, the son cannot be required to restore the money, and the case does not fall within s. 47 at all, for the section applies only to property actually remaining in the hands of the donee: *In re Player, Ex parte Harvey* (4); *In re Vansittart* (2); *In re Tankard.* (3) Moreover, even if this could be called a "settlement," it is not a voluntary statement: it is a settlement or a transfer made on a purchase for valuable consideration—a transaction, that is, outside the section. The two instruments clearly shew that the son, as well as the father, was to undertake heavy liabilities, including payment of the creditors in full; and under the arrangement the son himself found and paid large sums of money, none of which went into the father's pocket at all. The only benefit the son took was the father's indemnity to the creditors. An agreement or deed whereby money is covenanted to be paid voluntarily is not a "settlement of property" within s. 47: *Ex parte Bishop, In re Tönnies.* (5) Here the son got the property, not by the father's covenant, but by the general arrangements that had been made. Money paid by the father to the creditors is not "property" within the section. It would be carrying the section too far to say that money paid by the father to a third person, even though for the benefit of the son, casts an obligation on the son to restore the money so paid. The statute is merely intended to remove

(1) [1895] 2 Ch. 799, 807–8.
(2) [1893] 1 Q. B. 181.
(3) [1899] 2 Q. B. 57.
(4) 15 Q. B. D. 682.
(5) (1873) 8 Ch. 718.

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impediments which would otherwise exist to the trustees getting back the debtor's property.

[RIGBY L.J. What do you say is the net result of the agreement of July 13, 1898?]

It is that the son agreed to buy the business for 13,000*l.*, the father agreeing to give up his debentures and his debt of 688*l.* That purchase-money of 13,000*l.* was to be paid by the son, who was to pay the then known trade creditors for 5700*l.*, the father and son agreeing to pay the then unknown creditors. Thus the "settlement" was not a voluntary one; it was clearly a purchase for valuable consideration, and was, therefore, not within the section: *Hance* v. *Harding* (1), where it was decided that s. 47 may be read with s. 49 (*d*), which protects bonâ fide transactions without notice of any act of bankruptcy. Even under the bankruptcy legislation prior to the Act of 1883, a conveyance or transfer by a trader of property without valuable consideration was only void where the trader was insolvent at the time of executing the conveyance: Griffith and Holmes on Bankruptcy (1867), pp. 437, 438.

Younger, Q.C., in reply. The true nature of the bargain was to secure for the son this business, which he might carry on for his own benefit. The evidence shews that there was no valuable consideration moving from the father. The father never was liable himself to the creditors; he only undertook to become so for the benefit of the son. There was nothing to constitute the son a "purchaser" from the father—that is, a "purchaser" in the commercial sense, which is the meaning of the word in s. 47, corresponding to s. 91 of the Bankruptcy Act, 1869: *Ex parte Hillman, In re Pumfrey* (2), where it was held that the principle in *Price* v. *Jenkins* (3) does not apply to cases under the Bankruptcy Act. It is clear that an inadequate consideration for an assignment by a debtor makes it fraudulent as against creditors: *Mathews* v. *Feaver*. (4) A purchase, in the commercial sense, in the name of a son may be a "settlement": *Christy* v. *Courtenay*. (5) Here the father contributed to the purchase in the name of his son, and,

(1) (1888) 20 Q. B. D. 732.
(2) (1879) 10 Ch. D. 622, 625.
(3) (1877) 5 Ch. D. 619.
(4) (1786) 1 Cox, 278; 1 R. R. 39.
(5) (1850) 13 Beav. 96.

therefore, there is at any rate a resulting trust of a corresponding part of the property for the father, as in the case of a purchase of property in the name of one person by means of a joint advance: *Wray* v. *Steele.* (1) Although the subject-matter of the transaction may have ceased to be in the form in which it stood at the date of the transaction, it may be traced into the hands of the son who is carrying it on: *In re Mouat.* (2) An inquiry should, therefore, be directed as to what the property consisted of at the date of the act of bankruptcy, and in what proportion it had been contributed to by the father and son respectively. The proper relief would then follow from the answer to that inquiry, and the son would have the option either to pay the trustee for the father's share of the business, or to ask that the business might be realized for the benefit of the two contributors.

The decision in *In re Player, Ex parte Harvey* (3), apart from the doubts thrown upon it by later authorities, rested on the facts of the case, which were very special. [He also referred to *Dowse* v. *Gorton.* (4)]

Herbert Reed, Q.C., on the fresh cases cited in reply. *Ex parte Hillman, In re Pumfrey* (5), is dealt with in *Hance* v. *Harding* (6), where Lord Esher M.R. said that the former case did not go the length of deciding that "purchaser" in s. 91 of the Bankruptcy Act, 1869, corresponding to s. 47 of the present Act, was confined to a purchaser in the commercial sense.

Mathews v. *Feaver* (7) has no application. That was a case under 13 Eliz. c. 5. There the assignment was at a gross undervalue, so as to amount to a clear breach of good faith within the statute. *Christy* v. *Courtenay* (8) was also a case under the statute of Elizabeth. There a father had purchased chambers for himself, but transferred them into the name of the son. The evidence clearly shewed the ownership of the father.

(1) (1814) 2 V. & B. 388; 13 R. R. 124.
(2) [1899] 1 Ch. 831.
(3) 15 Q. B. D. 682.
(4) [1891] A. C. 190.
(5) 10 Ch. D. 622.
(6) 20 Q. B. D. 732.
(7) 1 Cox, 278; 1 R. R. 39.
(8) 13 Beav. 96.

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Wray v. *Steele* (1) was the case of the purchase of an estate by two persons on a joint account, the conveyance being made in the name of one of them, and merely illustrated the well-known equity rule as to a resulting trust. *In re Mouat* (2) simply decided that policies which had been voluntarily assigned by a testator remained his property and formed part of his estate which was insolvent, the fund being clearly ascertainable and under the control of the assignee.

LORD ALVERSTONE M.R. This case is one not without difficulty, and we have been very much assisted by the arguments that have been addressed to us by counsel. The question is whether a certain transaction entered into between the bankrupt and his son can stand as against the trustee in bankruptcy—that is to say, whether it constituted a "settlement of property" within s. 47 of the Bankruptcy Act, 1883.

Before I deal with the facts, it will be convenient to state my view of the law. There are two lines of cases bearing upon the subject, which I will indicate as follows. If there is a gift by a father to a son of money or proceeds of property which can be traced, and the money or proceeds is or are intended to be retained or preserved as the property of the donee, that money or those proceeds will be property in "settlement." On the other hand, if there is a gift of money or proceeds, but it is not intended that the money or the proceeds shall be retained by the donee in the form of money, but shall be expended at once, that will not be a "settlement." The latter case is illustrated by *In re Player, Ex parte Harvey.* (3) There a sum of 650*l.* had been given by the bankrupt to his son to enable him to start a business, and that sum, with some money of his own, constituted the son's capital in the business. It was held that the gift of the money to the son was not a "settlement of property" within s. 47. But where there was a gift of money by a father to his son to be applied in buying shares in a ship, on which shares the son was to receive the dividends, that was held to be within the section: *In re*

(1) 2 V. & B. 388; 13 R. R. 124. (2) [1899] 1 Ch. 831.
(3) 15 Q. B. D. 682.

Player, Ex parte Harvey. (1) It appears to me that Vaughan Williams L.J. in *In re Vansittart* (2), and Wright J. in *In re Tankard* (3), though in different language, express the same principle, and I myself would not wish to express it otherwise than as it is expressed in Wright J.'s judgment in the latter case, where he says (4): "I conceive, though there seems to be no authority on the point, that neither the original alienee, nor the transferee from him, could be required to restore money which he has spent or property which he has aliened before the bankruptcy, and without notice of any act of bankruptcy (or, perhaps, without knowledge of insolvency), though the alienee probably is liable to account for any proceeds which remain in his hands at the time of the bankruptcy—at any rate, if the acquisition by him of those proceeds was an object of the gift to him so that the proceeds can properly be said to represent the gift."

There are these two lines of cases, and the difficulty is to see within which line the present case falls. [His Lordship then gave a brief summary of the facts above stated, and continued:—]

Now there has been no attempt to impeach the transaction by which the Lewisham business was transferred to F. G. Plummer, the son. It is not suggested that the transfer was not bonâ fide, and the argument has proceeded on the basis that there was nothing fraudulent in the transaction, but that it was a perfectly legal arrangement for the father and son to make: the only question being whether, in consequence of the father having become bankrupt on March 25, 1899, the transaction can now be allowed to stand.

First, with regard to the agreement of July 13, 1898, it is not suggested that under that instrument alone any money actually proceeded from the father to the son; but it is said that the result of the father withdrawing in favour of the son his claim to the debentures held by him, and also his claim to the 688*l.* for which he was a simple contract creditor, was to improve the position of the son so that he acquired the business

(1) 54 L. J. (Q.B.) 553; 2 Mor. 261.
(2) [1893] 1 Q. B. 181.
(3) [1899] 2 Q. B. 57.
(4) [1899] 2 Q. B. 60.

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on better terms. I do not say that was not the result of the transaction, but I cannot say that there was anything paid to the son which could be called a "settlement."

Then with regard to the deed of August 15, 1898, the effect of that deed was that the father and son became jointly responsible to the creditors, and the son accordingly came under a direct obligation to the creditors to pay the amounts of the promissory notes there scheduled, and the considerations founded on the agreement of July 13 are referred to in the recitals in the deed. [His Lordship then read from the deed the clause above quoted, whereby the father covenanted and agreed that all the payments made or to be made by him under the two instruments, and all the property handed over by him to his son, were given to the son "as an absolute and irrevocable gift . . . . not only for the considerations aforesaid, but also for natural love and affection." [His Lordship proceeded:—]

It is to be noticed in passing that this clause refers to "the considerations aforesaid" as well as to the "natural love and affection." Mr. Younger says that clause amounts in effect to an absolute gift to the son of a very large part of the surplus value of the business. I do not myself feel pressed by the view that the transaction may have resulted in the son obtaining a business of a greater value than he would have done if the debenture-holders had been left to enforce their securities against the assets of the company. But I do not think the facts support Mr. Younger's view. Let us see what the son did. He carried on the business with activity and energy, and obtained by his own exertions a sum of about 5000*l.*; and he contributed or found by these means sufficient money, together with what he got from his father, to pay the creditors the sums due to them on the joint and several promissory notes. Therefore it is impossible to say he did not give valuable consideration for the transaction, and that the sums so paid were solely the product of the business given him by his father. The son took upon himself very responsible liabilities: he himself managed the business; he obtained by means of the business large receipts which were the result of his own management, and was

thereby enabled to carry out, and did carry out, the transaction. The learned judge has said that the transaction cannot now be set aside, and that it is not one that is voidable under s. 47, and I have arrived at the same conclusion.

We have been pressed by Mr. Younger to hold that the transaction is bad on two grounds. In the first place, he says that the business, or a substantial part of it, was acquired by the son from the father, and therefore must be treated, either in whole or in part, as a "settlement." I cannot adopt that view. In the first place, the business was not in fact sold by the father to the son. The acquisition of the business by the son would, no doubt, not have been possible without the father's assistance; but the mere fact that the business was acquired partly by means of money obtained from the father, the bankrupt, is not sufficient to make the transfer to the son a "settlement" of the business. In my opinion, the transaction is, neither in whole nor in part, a "settlement" within the section.

Then it was urged that, at any rate, to the extent to which the payments by the father or the releases by the father brought this business into the hands of the son, the transfer ought to be set aside under s. 47. Mr. Younger says there ought to be an inquiry as to what the property of the bankrupt consisted of at the date of the act of bankruptcy, and that, if it were found that this business was the property of the bankrupt, the son must be ordered to pay the value of it. I do not agree with that view. There is no authority, nor is there any provision in the Bankruptcy Act, so far as I understand it, applying to property of this fluctuating character. All the authorities to which our attention has been called were cases where the money given could be traced or had to be accounted for, or where property had been purchased with it, as in *In re Tankard.* (1) In my opinion, there is nothing here amounting to a settlement of the business by the father any more than if the business had been purchased by the son out of his own moneys.

There is only one other point which I should notice, namely,

(1) [1899] 2 Q. B. 57.

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whether the son was a purchaser for value of that which he got. In my opinion he was. It appears to me that he did purchase from the company, with the assistance of his father, this business. He paid money and became subject to liabilities. I do not think we ought to say that any part of what he paid went into the pocket of his father. But that must not be forgotten, which is plain upon the facts, namely, that the father had a distinct interest in maintaining the credit of the business and in seeing that the business would not be injured by the transactions of the company, and that the arrangement was entered into perfectly bonâ fide with the object of maintaining his own credit.

For these reasons, I am of opinion that the transaction cannot be upset, and that the judgment of Wright J. is correct.

RIGBY L.J. I am of the same opinion. I do not think *In re Player, Ex parte Harvey* (1), has been at all successfully impeached. It appears to me that in that case the Court went on the very intelligible principle that a gift of money which is not hedged about with conditions that it shall be invested and kept in a certain way cannot be called a "settlement" within the meaning of s. 47. I think that with regard to the judgment of Cave J., which was the judgment mainly referred to in the course of the argument, most of the criticisms were based upon a mistaken view of that judgment. What Cave J. said was that, although money was "property" within the meaning of the interpretation clause, s. 168, it did not follow that every gift of money was a "settlement." I do not think that that judgment has been impeached by any of the later authorities that have been referred to. The right view of the transaction in the present case seems to me to be this—that although the father did release to the company certain debentures and a certain debt, and made various payments to the creditors of the company, he did so, not with the view of making a settlement on his son, but of making his son purchaser of the business. If the father had insisted on his strict rights,

(1) 15 Q. B. D. 682.

no doubt the sale would never have taken place at all. The transaction was not so much an advancement to the son by the father, as a means adopted by the father of holding the business together and getting rid of the claims of creditors, so that the son might be able to start the business himself. For that purpose the company was released from all claims by the father, and the debts due to the company's creditors were settled there and then. No claim can be made by the trustee in bankruptcy or by any one else in respect of the releases, or in respect of any sums paid by the father under the arrangement. That the son got the business is true, but that he got it on undue terms I am not convinced of. I am not sure that the transaction was in itself a profitable one at all. It is in evidence that the son was enabled to pay the creditors out of moneys he had raised by successful speculations, and it is by means of these speculations that the business has been preserved. Even if I came to the conclusion that there was a "settlement," there would be no reason to set it aside from the date of the bankruptcy as against the trustee. I altogether disagree with the view that you can treat moneys paid or claims released by the father to advance his son in a trading concern as if they were voluntary gifts to the son within the section, and that you can claim to have them back as being still in existence in the sense that they were in the business, and can therefore be followed: I do not think they were. Upon the evidence, I do not think that any of the sums paid by the father were in the business. Upon all the facts, I cannot say that at the date of the bankruptcy any part of the business was the property of the bankrupt.

COLLINS L.J. I am of the same opinion. The question is one of fact. It appears to me that the real transaction was this—that the father, for reasons of his own, wished the business to be sold, and in assisting his son to acquire it an arrangement was made by which the debts due to the creditors of the company were to be discharged. The son then undertook certain liabilities as the consideration for the transfer of the business. I am not satisfied that there was

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any surplus in the value of the business, and, therefore, I do not think it possible to impeach the transaction within s. 47. There is really no voluntary gift on the part of the father at all. If there is a gift to any one, it is a gift to the father himself. He was desirous of paying off the creditors of the company, and making it appear that the debentures were satisfied, his object being rather to benefit his own reputation than to benefit his son. Therefore, on two grounds, first, that the business was not the property of the father at the date of the bankruptcy, and, secondly, that there was a valuable consideration moving from the son, the transaction can, in my opinion, stand. I do not think it is possible, under s. 47, to avoid a transaction between father and son where the son has purchased a business with money advanced to him by the father, if the business is of such a character that it is impossible afterwards to trace the money so advanced, as, for instance, in the case of a timber merchant's business, where the money actually employed and spent in carrying on the business cannot be afterwards drawn out: it is impossible, in my opinion, to treat such a transaction as the subject-matter of a "settlement" within the section.

If the arrangement had been really a settlement of the business by the father on the son, I should be sorry to hold that such a transaction as could not be reached by the section; but in my opinion the present transaction does not come within the section at all.

Appeal dismissed.

Solicitors: *Marshall & Pridham, for W. C. Cripps, Son & Daish, Tunbridge Wells; Phelps, Sidgwick & Biddle.*

G. I. F. C.

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ADULTERATION —*Compounded Drug—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 7.

A sale to the prejudice of the purchaser of a compounded drug, which is not of the nature, substance, and quality of the article demanded, is an offence under s. 6 of the Sale of Food and Drugs Act, 1875, and proceedings for the recovery of a penalty may be taken under that section. BEARDSLEY *v.* WALTON & Co. - **Div. Ct. 1**

2. —— *Sale to Prejudice of Purchaser — Defence that Article Bought with Written Warranty—Subsequent Proceedings against Wholesale Merchant—Certificate of Analyst—Evidence—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 14, 21, 25—*Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 6, 7, 12.

Where, upon the hearing of a summons under s. 6 of the Sale of Food and Drugs Act, 1875, the defendant establishes the defence under s. 25 of the Act that he bought the article with a written warranty and sold it in the same state as when he purchased it, the certificate of the public analyst used in those proceedings is not evidence in subsequent proceedings before justices against the person from whom the defendant purchased the article.

Upon the hearing of a summons under the above section for selling as butter an article which was not of the nature, substance, and quality of the article demanded, the certificate of the public analyst shewed the article sold to be margarine; the summons was, however, dismissed on the defendant proving a purchase with a written warranty from the respondents. A summons was then taken out against the respondents under s. 6 of the Margarine Act, 1887, for delivering the margarine in a package not marked as required by the section, and at the hearing before justices the same certificate was tendered as evidence against the respondents, but was rejected :—

Held, that the certificate was not evidence against the respondents that the article sold and delivered by them was margarine, and that the evidence was properly rejected. TYLER *v.* KINGHAM & SON, LIMITED - - **Div. Ct. 413**

3. —— *Sample — Purchase for Analysis — Mode of dividing Sample—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.

Where a purchase is made of several articles of food or drugs at the same time for the purpose of analysis, each article purchased must be divided into three parts, and otherwise dealt with as required by s. 14 of the Sale of Food and Drugs Act, 1875. Where a purchase is made of six bottles of the same article of food or drug, each bottle is for the purposes of the Act a separate article, and it is therefore not a sufficient compliance with the requirements of s. 14 for the purchaser to divide them into three lots of two bottles each without opening any of the bottles, and to hand one lot to the analyst, one to the seller, and to retain one himself. MASON *v.* COWDARY - - - - **Div. Ct. 419**

4. —— *Written Warranty—Contract to Supply Milk in Instalments — "Milk to be Pure New Milk" — Whether a Warranty within the Act—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 25.

By s. 25 of the Sale of Food and Drugs Act,

ADULTERATION—*continued.*

1875, "If the defendant in any prosecution under this Act prove to the satisfaction of the justices . . . . that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor and with a written warranty to that effect," he shall, under certain other specified conditions, be entitled to be discharged from the prosecution.

Upon the hearing of an information against the respondent for having, contrary to the provisions of the Act, sold on December 15, 1899, certain milk to the appellant which was not of the nature, substance, and quality demanded of him by the appellant, the respondent relied on an agreement in writing dated January 20, 1899, by which a farmer agreed to sell to the respondent 1000 gallons of milk weekly, "the milk to be pure new milk":—

Held, that, even if the agreement amounted to a warranty within the meaning of s. 25, there must be some evidence in writing to shew that the particular milk sold to the appellant was purchased with that warranty, and that in the absence of that evidence the agreement afforded no defence to the respondent. ROBERTSON *v.* HARRIS - - - - **Div. Ct. 117**

ADVANCEMENT—Business, Purchase of—Earmarking gift — Alienation of gift — Settlement of property - - **790**
See BANKRUPTCY. 15.

AFTER-ACQUIRED PROPERTY—Undischarged bankrupt — Personal earnings — Interpleader—Wagering contract - **497**
See BANKRUPTCY. 13.

AGENT—Broker lumping several orders in one contract—Liability of principal to jobber on default of broker - - **18**
See STOCK EXCHANGE. 2.

—— Principal and agent—Broker, Default of—Liability of client to jobber—Privity of contract - - - - **260**
See STOCK EXCHANGE. 1.

ALEHOUSE—Licensing Acts.
See Cases under LICENSING ACTS.

ANALYST—Sale of food and drugs.
See Cases under ADULTERATION.

ANTICIPATION—Restraint upon—Wife's contracts during coverture—Judgment after cessation of coverture—Separate property - - - - **784**
See HUSBAND AND WIFE.

APPEAL—Costs of licensing justices on successful appeal—Taxation - - **666**
See LICENSING ACTS. 3.

—— Licence—Refusal to renew—Costs of justices — Indemnity costs, Right to — Mandamus - - - - **576**
See LICENSING ACTS. 1.

—— To quarter sessions — Licence — Onus of proof—Refusal to renew without evidence - - - - **224**
See LICENSING ACTS. 2.

APPOINTMENT—Arbitrator—Refusal of party to appoint—Jurisdiction of Court to stay action - - - - **606**
See ARBITRATION. 3.

APPOINTMENT—*continued.*

—— Of liquidator after winding-up order — Official receiver - - - **634**
See COMPANY. 3.

—— Trustee in bankruptcy—Release—Subsequent assets — Right of creditors to appoint new trustee - - **649**
See BANKRUPTCY. 10.

ARBITRATION—*Award—Extension of Time for making Award—Jurisdiction of Court or Judge—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 9, 24—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 180, *sub-s.* 9.

Sect. 180, sub-s. 9, of the Public Health Act, 1875, which enacts that the time for making an award by arbitrators or an umpire under that Act shall not in any case be extended beyond the period of two months from the date of the submission to arbitration or the date of the reference of the matters to the umpire respectively, deals only with the power of the arbitrators or umpire to extend the time, and does not affect the jurisdiction of the Court. Under s. 9 of the Arbitration Act, 1889, the Court or a judge has jurisdiction to extend the time for making an award under the Public Health Act, 1875, although the time for making the award has expired.

In re Mackenzie and Ascot Gas Co., (1886) 17 Q. B. D. 114, overruled.

Warburton v. *Haslingden Local Board*, (1879) 48 L. J. (Q.B.) 451, approved. KNOWLES & SONS, LIMITED *v.* BOLTON CORPORATION **C. A. 253**

2. —— *Costs—Reference of Action to Arbitrator—Costs of Reference, whether Taxable on High or County Court Scale—Reference whether by Consent or Compulsory—Practice—Rules of Supreme Court, Order* LXV., *r.* 12—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 14, 15.

An action of contract was referred by order of a district registrar, on the ground that it involved matters of account, to an arbitrator agreed on by the parties, and the order of reference provided that the costs of the action should abide the event of the award and the costs of the reference and award should be in the discretion of the arbitrator. The arbitrator awarded that an amount less than 50*l.* was due from the defendant to the plaintiff, and that the defendant should pay to the plaintiff his costs of the reference and award:—

Held, that the plaintiff was entitled to have the costs of the reference taxed on the High Court scale.

Moore v. *Watson*, (1867) L. R. 2 C. P. 314, disapproved of. STREET *v.* STREET - **C. A. 57**

3. —— *Submission to three Arbitrators — Refusal of Party to appoint Arbitrator—Jurisdiction of Court to stay Action — Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

Where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and one of the parties refuses to appoint an arbitrator and brings an action against the other party to the submission, the Court has, under s. 4

ARBITRATION—*continued.*
of the Arbitration Act, 1889, power to stay the action. MANCHESTER SHIP CANAL COMPANY *v.* S. PEARSON & SON, LIMITED - - C. A. 606

—— Workmen's Compensation Act—Time for commencing proceedings—"Claim for compensation" - - - 145
See EMPLOYER AND WORKMAN. 3.

ARMY ACT — Turnpike Acts—Tolls—Exemption — Carriage employed in military service of Crown - - - 444
See HIGHWAY. 2.

ARREARS—Water rate—Trustee in bankruptcy — "Incoming tenant" — Payment of arrears under protest - - 32
See BANKRUPTCY. 11.

ASSIGNMENT — Act of bankruptcy — Assignment by partners for benefit of trade creditors only - - - 329
See BANKRUPTCY. 1.

—— Breach of covenant against—Subsequent assignment of reversion — Re-entry—Consent judgment—Covenant for quiet enjoyment - - - - 609
See LANDLORD AND TENANT. 1.

—— Equitable—Covenant not to assign — Forfeiture — Declaration of trust—Service on "lessee" - - - 267
See LANDLORD AND TENANT. 2.

ATHLETIC SPORTS — False pretences—False statements as to name and performances —Attempt to obtain prize - 597
See CRIMINAL LAW. 1.

AVERAGE—General average — Charterparty—Bill of lading—Negligence clause 540
See SHIPPING. 3.

—— General average—Sacrifice of freight 515
See SHIPPING. 4.

—— General average loss — Ship valued for policy at less than real value—Salvage —Liability of underwriter - 748
See INSURANCE, MARINE. 5.

AWARD—Extension of time for making—Jurisdiction of Court - - - 253
See ARBITRATION. 1.

BANKER—*Cheque—Defective Title — Receiving Payment for a Customer—"Customer"—Liability of Banker—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 81, 82.

In order to constitute a person a "customer" of a bank within the meaning of s. 82 of the Bills of Exchange Act, 1882, it is not necessary that he should have an account at the bank.

A rate-collector had been in the habit for several years of receiving cheques for rates and cashing them at a country branch of the defendants' bank, where he was known, but had no account. By falsely pretending to the plaintiffs, who were ratepayers, that a rate had been made and was due, he obtained from them a cheque, drawn to his order upon a London bank, crossed generally, and marked "not negotiable." He indorsed the cheque and handed it in to the defendants' branch bank, where it was cashed for him, a portion of the proceeds being applied by the bank according to his request, and the balance being handed to him in cash. This balance he appropriated to his own use. The defendants received payment of the cheque from the bank on which it was drawn before the collector's fraud was discovered. In an action to recover the amount so paid, it was found as a fact that the defendants received the money in good faith and without negligence:—

Held, that in the circumstances the rate-collector, although he had no account with the defendants, was a "customer" of the bank within the meaning of s. 82 of the Bills of Exchange Act, 1882, and (Vaughan Williams L.J. doubting) that the defendants received payment of the cheque for the rate-collector and not for themselves; and that, therefore, the defendants were protected by s. 82, and were not liable.

Judgment of Bigham J., [1899] 2 Q. B. 172, affirmed. GREAT WESTERN RAILWAY COMPANY *v.* LONDON AND COUNTY BANKING COMPANY
C. A. 464

BANKRUPTCY—*Act of Bankruptcy—Assignment of whole Property—Assignment by Partners for Benefit of Trade Creditors only—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*).

By s. 4, sub-s. 1, of the Bankruptcy Act, 1883 a debtor commits an act of bankruptcy if (*a*) "he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally":—

Held, that an assignment by a debtor for the benefit of his trade creditors only was not an act of bankruptcy under clause (*a*). *In re* PHILLIPS. *Ex parte* BARTON - - - Div. Ct. 329

2. —— *Bankruptcy Notice — Partnership — Dissolution — Partnership Debts — Writ against Firm after Dissolution — Service on each late Partner—Judgment against late Firm—Liability of Partners after Dissolution—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 38—*Bankruptcy Notice against Firm—Notice following Judgment—Petition against one late Partner only—Receiving Order—Procedure—Irregularity — Amendment — Application of Rules of Supreme Court to Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 2; *ss.* 115, 143—*Bankruptcy Rules*, 1886, *rr.* 136, 262, 353, *and Appendix, Form* 6—*Rules of Supreme Court*, 1883, *Order* XLVIII. *a*, *rr.* 1–8.

Judgment was recovered, in default of appearance, against a late partnership firm of "W. Brothers," in an action brought against it after its dissolution, for a debt incurred during the partnership. The writ had been served on each of the late partners, J. W. & T. W. A bankruptcy notice in the usual form, and following the judgment, was then addressed to "W. Brothers" and served personally on each of the late partners. The notice not having been complied with, the judgment creditor presented a petition against J. W. alone:—

Held, by the Divisional Court (Wright and Darling JJ.), that the bankruptcy notice was good, having followed the judgment; and that as it had been served on J. W. personally, a

BANKRUPTCY—*continued.*
receiving order on the petition could properly be made against him.

On appeal by J. W. to the Court of Appeal (Lord Alverstone M.R., Rigby and Collins L.JJ.):—

Held, that under Rules of the Supreme Court, Order XLVIII. *a*, the action had been properly constituted against "W. Brothers" as a firm, notwithstanding its dissolution, since the cause of action had accrued before the dissolution (Partnership Act, 1890, s. 38); and that, under the same Order, the judgment was enforceable against each of the late partners:—

Held, also, by Lord Alverstone M.R. and Rigby L.J. (Collins L.J. doubting), that under s. 115 of the Bankruptcy Act, 1883, bankruptcy proceedings on the judgment would lie against the firm notwithstanding its dissolution, and that therefore the bankruptcy notice, though addressed to a then non-existent firm, was sufficient to support a receiving order under rule 262 of the Bankruptcy Rules, 1886, against J. W. alone:

But *held*, by Collins L.J., that even if the bankruptcy notice was technically defective as against J. W., yet under the circumstances the defect was one that had not caused him any "substantial injustice," and was therefore capable of amendment under s. 143.

Decision of Divisional Court affirmed. *In re* WENHAM. *Ex parte* BATTAMS - **C. A. 698**

3. —— *Charging Order — Costs—Solicitor—Lien—"Property recovered or preserved" in Bankruptcy Proceedings—Jurisdiction—Judge of High Court—Judge in Bankruptcy—Practice—Application to discharge Order—Ex parte Proceedings—Time—Delay—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

Any judge of the High Court, whether sitting in bankruptcy or not, can make a charging order under s. 28 of the Solicitors Act, 1860; and, *semble*, so also can a judge who is a judge of the Court of Bankruptcy alone, where in the course of bankruptcy proceedings property has been "recovered or preserved."

A charging order under the section can be made by any judge of the Division in which the "suit, matter, or proceeding" has been heard, and the application for the order need not necessarily be made to the particular judge who heard the suit, matter, or proceeding.

In re Suffield and Watts, (1888) 20 Q. B. D. 693, and *In re Wood, Ex parte Fanshawe*, [1897] 1 Q. B. 314, considered.

An application to discharge a charging order under the above section, as in all cases in which it is sought to set aside ex parte proceedings, must be made promptly: for instance, an application made after the lapse of two months from the service of the order, without sufficient cause shewn for the delay, is too late. *In re* DEAKIN. *Ex parte* DANIELL - - - **C. A. 489**

4. —— *Fraudulent Preference—Money lent for a Special Purpose—Repayment after Act of Bankruptcy—Dominant View of Debtor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

When a debtor with bankruptcy impending pays a creditor in the honest belief on reasonable grounds that he is legally bound to make the payment, it is not a fraudulent preference even although the debtor is in fact under no legal obligation to make the payment. *In re* VAUTIN. *Ex parte* SAFFERY - - **Wright J. 325**

5. —— *Fraudulent Preference—Payment of Creditor with a view to Prefer Surety—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

In order to constitute a fraudulent preference within the meaning of s. 48 of the Bankruptcy Act, 1883, a payment made by a debtor to one of his creditors must be made to the creditor intended to be preferred. Where, therefore, an insolvent debtor, who is jointly and severally liable with two sureties upon a promissory note, pays the amount of the note to the payee with the view of preferring the sureties by releasing them from their contingent liability upon the note, the payment is not a fraudulent preference within that section, and the sureties cannot be ordered to pay over to the trustee in bankruptcy the amount so paid by the debtor. *In re* WARREN. *Ex parte* TRUSTEE - - - **Div. Ct. 138**

6. —— *Manager—Petition—Official Receiver—Interim Receiver—Special Manager—Jurisdiction—Dismissal of Petition—Order appointing Interim Receiver, Validity of—Business of alleged Debtor carried on by Special Manager—Accounts—Remuneration and Expenses of Special Manager—Charge on Profits—Just Allowances—Officers of the Court, Protection of—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 10, 12—*Bankruptcy Rules*, 1886, *rr.* 170–175.

Where, during the pendency of a bankruptcy petition which is ultimately dismissed without any receiving order having been made upon it, the official receiver, on being appointed interim receiver under s. 10 of the Bankruptcy Act, 1883, appoints, in exercise of his power under s. 12 ([1900] W. N. 12), a special manager of the alleged debtor's business, the special manager is entitled to be reimbursed out of his receipts from the business his expenses, including remuneration, properly incurred by him in carrying it on until the dismissal of the petition.

The fact that the special manager has, under such circumstances, been in possession of and carrying on the business does not entitle the alleged debtor, on the petition being dismissed, to treat him as a wrong-doer or to deprive him of his right to protection as an officer of the Court; for, as the Bankruptcy Court has jurisdiction to entertain a petition against an alleged debtor, an order appointing the official receiver as interim receiver during the pendency of the petition, with the consequent right of appointing a special manager under s. 12, continues valid until it is set aside, and thus imparts validity to everything done under it, even though it may turn out to have been erroneously made—as where, at the hearing of the petition, it appears that the alleged debtor, being a foreigner not subject to the jurisdiction of the Bankruptcy Court, is not a "debtor" within the meaning of the Act ([1900] 1 Q. B. 541), and, therefore, not subject to the provisions for the appointment of an interim receiver or a special manager.

Per Rigby L.J. The power of the Bankruptcy Court to appoint the official receiver to be interim

BANKRUPTCY—*continued.*

receiver under s. 10 of the Act arises immediately upon the presentation of the petition, whatever the result of the petition may be.

The special provisions of rules 170-175 (Bankruptcy Rules, 1886) relating to the appointment of the official receiver as "interim receiver," and providing for the deposit in advance of a sum for his expenses, do not deprive him of his subsequent right to reimbursement out of his receipts of all expenses incurred by him in carrying out the duties of his office.

Those rules apply exclusively to an interim receiver, and not to a special manager at all.

The principles on which accounts should be taken of the proceeds of a business carried on on behalf of the owner, considered. *In re* A. B. & Co. (No. 2) - - - - C. A. 429

7. —— *Petition—Withdrawal—Dismissal by Consent—Increased Debt, Second Petition for—Receiving Order—Extortion—Pressure—Abuse of Process of Court—Procedure—Leave of Court to Withdrawal of Petition—Terms to be submitted to Court—Debtor and Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 7.

Where a creditor, having presented a bankruptcy petition against his debtor based upon a particular debt, such as a judgment debt, consents to its being dismissed upon the terms of the debtor agreeing to pay a fresh debt of increased amount, it is not an abuse of the process of the Court for the creditor, in case of the debtor making default, to present a second petition based upon the new debt, provided he has not used extortion or pressure towards the debtor.

Leave to withdraw a creditor's bankruptcy petition under s. 7, sub-s. 7, of the Bankruptcy Act, 1883, should not be given without the Court being first informed of the facts of the case and the proposed terms of withdrawal, so that it may exercise its judgment as to whether the case is a proper one for allowing a withdrawal. *In re* BEBRO - - - - - C. A. 316

8. —— *Secured Creditor—Pending Action—Rules of the Supreme Court*, 1883, *Order* XIV., *r.* 6—*Payment into Court for Leave to Defend—Bankruptcy of Defendant before Trial—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 168.

Money paid into court under the Rules of the Supreme Court, 1883, Order XIV., for leave to defend, must be treated as money paid in to abide the event, and is a security to the plaintiff for the sum for which he may obtain judgment at the trial; and if the defendant becomes bankrupt before the trial, the money must remain in court until "the event" is decided by the trial of the action, if that is to be tried, or by adjudication upon a proof by the plaintiff in the bankruptcy. *In re* FORD. *Ex parte* THE TRUSTEE Wright J. 211

9. —— *Trustee in Bankruptcy—Costs—Taxation—Practice—Committee of Inspection—Employment of Solicitor—Authority to do Particular Things—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 57, *sub-s.* 3; *s.* 73, *sub-s.* 3—*Bankruptcy Rules*, 1886, *rr.* 117, 285—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 15, *sub-s.* 3.

The Bankruptcy Act, 1883, s. 57, empowers a

BANKRUPTCY—*continued.*

trustee with the permission of the committee of inspection to (amongst other things) employ a solicitor to take any proceedings or do any business which may be sanctioned by the committee of inspection, and enacts: "The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases."

Sect. 73, sub-s. 3, provides that the taxing master, in taxing the bills and charges of solicitors, "shall satisfy himself before passing such bills and charges that the employment of such solicitors, in respect of the particular matters out of which such charges arise, has been duly sanctioned"; and s. 15 of the Bankruptcy Act, 1890, enacts that "the sanction required under s. 73 of the principal Act for the employment of solicitors . . . . must be a sanction obtained before the employment."

The Bankruptcy Rules, 1886, provide (rule 285): "The official receiver until a trustee is appointed, and thereafter the trustee, shall keep a book, to be called 'The Record Book,' in which he shall record all minutes, all proceedings had, and resolutions passed at any meetings of creditors, or of the committee of inspection, and all such matters as may be necessary to give a correct view of his administration of the estate"; and (rule 117), "before taxing the bills or charges of any solicitor . . . . employed by an official receiver or trustee, the taxing officer shall require a certificate in writing, signed by the official receiver or trustee, as the case may be, to be produced to him, setting forth . . . . in the case of the bills of costs of a solicitor, a copy of the resolution or other authority sanctioning the employment."

In 1897 the tenant for life of large settled estates became bankrupt. The official receiver at first acted as trustee with a committee of inspection, and, with the sanction of the committee, employed A. & Co. as his solicitors in all matters relating to the letting and management of the estates. In 1898 M. was appointed the trustee in the bankruptcy with the same committee of inspection, and applied to them for permission to employ A. & Co. in the same capacity as before. Thereupon they passed the following resolution: "That Messrs. A. & Co. be employed by the trustee where necessary.' Under this resolution M. employed A. & Co. in all matters connected with the letting and management of the estates. All the debts having been paid, A. & Co. carried in their bill of costs for taxation. The bankrupt objected to all items and charges relating to the letting and management of the estates on the ground that the written sanction of the committee for the disputed matters had not been obtained in accordance with the sections of the Acts and the Rules above stated. The committee deposed that they intended their resolution to apply to the disputed matters. The taxing master having overruled the objection, the plaintiff appealed:—

Held, (1) that the resolution was in form insufficient; (2) that the sanction of the com-

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mittee need not be in writing, provided it was specific and given before the work was done; and (3) that the bill of costs must be reviewed on this footing. *In re* VAVASOUR **Wright J. 309**

10. —— *Trustee in Bankruptcy—Practice—Small Bankruptcy—Release of Trustee—Subsequent Assets—Right of Creditors to appoint New Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 82, 121—*Bankruptcy Discharge and Closure Act*, 1887 (50 & 51 *Vict. c.* 66), *s.* 6, *sub-s.* 2.

In a summary bankruptcy, as in an ordinary bankruptcy, after the release of the trustee or of the official receiver acting as trustee, the creditors have no power to appoint a new trustee to administer further assets that may come in; but the official receiver is the trustee for that purpose, if necessary. *In re* LEACH. *Ex parte* BARNES - - - - **Wright J. 649**

11. —— *Trustee in Bankruptcy — Rates — "Incoming Tenant"—Water rate—Payment of Arrears under Protest—Trustee's Right to Recover same from Water Company—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 43, 53, 70–74—*Metropolis Water Act*, 1871 (34 & 35 *Vict. c.* 113), *s.* 48.

A debtor having been adjudicated a bankrupt, his trustee in bankruptcy took possession of his business premises and found that the water rate was in arrear. The trustee offered to pay in advance from the date of the adjudication for a supply of water, but the water company declined to supply it unless the arrears were paid, and cut off the water. Thereupon the trustee paid the arrears under protest:—

Held, that under s. 48 of the Metropolis Water Act, 1871, the trustee, being in the position of an "incoming tenant," was not liable for the arrears, and was entitled to recover from the water company the amount paid under protest. *In re* FLACK. *Ex parte* BERRY - **Wright J. 32**

12. —— *Trustee in Bankruptcy, Title of—Broker and Customer — Customer's Speculative Account—Bankruptcy of Broker—Differences due to Customer—Rules of the Stock Exchange—Surplus in Hands of the Official Assignee of the Stock Exchange.*

A broker on the Stock Exchange was officially declared a defaulter. The same day the official assignee, under the Rules of the Stock Exchange, closed all accounts of the broker then open, and received and paid all amounts owing by or to him on the Stock Exchange, and, after payment of all the Stock Exchange liabilities of the broker, there remained a surplus in the hands of the official assignee. Shortly afterwards the broker was adjudicated bankrupt with large outside liabilities. Part of the surplus above mentioned comprised a sum of money which represented differences, being profits, due on contracts made with jobbers on the Stock Exchange by the broker as agent for an outside customer, who was running a speculative account on the Stock Exchange through him, and which the broker, on the day he became a defaulter, had he been then solvent, would have received for the customer. Both the customer and the trustee in bankruptcy of the broker having

BANKRUPTCY—*continued.*

claimed this sum of money, the official assignee paid it into court under an interpleader summons:—

Held, that the sum of money in question was merely a book-debt of the broker and formed part of his general assets, and therefore passed to his trustee in bankruptcy; and that the remedy of the customer was to prove in the bankruptcy for the amount.

Judgment of Phillimore J., [1899] 2 Q. B. 555, affirmed. KING *v.* HUTTON - **C. A. 504**

13. —— *Undischarged Bankrupt—After-acquired Property — Personal Earnings — Interpleader—Wagering Contract—Money deposited as Stakes—Stakes claimed by Trustee in Bankruptcy—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18—*Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 53.

The defendant, a professional billiard player, who was then an undischarged bankrupt, agreed to play a match at billiards with another billiard player for 100*l.* a side, and each party deposited that amount with stakeholders. The defendant won the match, and thereupon both the defendant and the plaintiff, his trustee in bankruptcy, claimed the stakes. The stakeholders interpleaded; and, the money having been paid into court, an issue was directed to try whether the plaintiff or the defendant was entitled to the money:—

Held (varying the order of Phillimore J., [1899] 2 Q. B. 560), that the plaintiff was entitled to the whole of the money. SHOOLBRED *v.* ROBERTS - - - - **C. A. 497**

14. —— *Voluntary Settlement—Discretionary Trust to pay future Debts—Intent to Defeat and Delay future Creditors—Fraudulent Conveyances Act*, 1571 (13 *Eliz. c.* 5).

A voluntary settlement, honestly entered into at the time it is made, all then existing debts being paid, and the settlor retaining an income sufficient for reasonable and probable requirements, ought not to be treated as fraudulent and void under the statute 13 Eliz. c. 5, merely because some years afterwards it has the effect of defeating or delaying the subsequent creditors of the settlor.

In 1891 A., a few days after attaining twenty-one, executed a voluntary settlement whereby she vested the whole of her property in trustees with an absolute discretionary trust to apply either capital or income in payment of any of her then existing or future debts; and a further discretionary trust to apply the income during her life for the benefit of herself or any husband or children. The deed contained a power for A. to revoke the settlement with the consent of her trustees. The few debts she had at the date of the settlement were paid out of cash in hand. On two subsequent occasions A. executed partial revocations of the settlement, and portions of the settled funds were applied by the trustees in payment of her debts; but the trustees refused a third time to pay her debts, and thereupon, in February, 1900, she was adjudicated bankrupt, having no assets except the settled property:—

Held, that the settlement was not fraudulent and void under 13 Eliz. c. 5, as against her

BANKRUPTCY—*continued.*
trustee in bankruptcy. *In re* LANE-FOX. *Ex parte* GIMBLETT - - - Wright J. 508

15. —— *Voluntary Settlement—Father and Son—Purchaser for Value—Gift of Money—Advancement—Business, Purchase of—Earmarking Gift—Alienation of Gift—"Settlement of Property"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 47, 168.

In May, 1896, a trader, then in good credit, sold his business to a limited company promoted by him for the purpose of purchasing it. He and his son took between them practically the whole of the shares issued by the company, and substantially the whole of the debenture issue was taken by the father himself. The company was unsuccessful, and, in May, 1898, went into voluntary liquidation; whereupon, with a view to preserving the father's credit, he and his son entered into an arrangement by deed with the company, by its liquidator, and the company's ascertained creditors, whereby the son purchased the company's business in consideration partly of a sum in cash and partly of payment by him of the debts due to the ascertained creditors secured by joint and several promissory notes of the father and son; and, by way of further consideration, the father surrendered his debentures and a private debt due to him from the company. The father and son also covenanted to pay off any then unascertained creditors of the company, and to indemnify the company and its assets against all claims in respect of the business, and the father covenanted with the son that all moneys paid by him, the father, under the arrangement, and all property thereby handed over by him to the son, should be treated "as an absolute and irrevocable gift" from him to the son.

The son thereupon took over the business, and carried it on with such success that, by means partly of his earnings and partly by contributions from his father, the whole of the purchase-moneys and debts payable under the arrangement were discharged. Subsequently, in March, 1899, the father became bankrupt; whereupon the trustee in bankruptcy applied to have the transfer of the business to the son under the arrangement of 1898 declared void as a "settlement" within s. 47 of the Bankruptcy Act, 1883:—

Held, by the Court of Appeal (affirming Wright J.), that the mere fact that the business had been acquired by the son partly by means of money obtained from or paid by the father was not sufficient to make the transfer a "settlement" within s. 47.

"Settlement" in s. 47 of the Bankruptcy Act, 1883, means such a conveyance or transfer by the donor as contemplates the retention of the property by the donee, either in its original form or in such a form that it can be traced, and does not extend to a conveyance or transfer of property which cannot be traced, as, for instance, where there is a gift of money to be employed in a business or in the purchase of a business, and the money is so employed or spent, the business itself not being settled.

In re Player, Ex parte Harvey, (1885) 15 Q. B. D. 682, approved of.

BANKRUPTCY—*continued.*

The principles stated in *In re Vansittart*, [1893] 1 Q. B. 181; *In re Tankard*, [1899] 2 Q. B. 57, 60, 61, approved of. *In re* PLUMMER C. A. 790

16. —— *Voluntary "Settlement"—Life Policy—Post-nuptial Settlement—Covenant to keep up Policy, Absence of—Premiums—Voluntary Payment by Settlor—Bankruptcy of Settlor—Policy Moneys—Proportion not represented by each Premium—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

The payment of a premium on a life policy is not to be regarded as securing a certain part of the money assured by the policy. The whole of the premiums are paid to keep up the policy, and no proportionate part of the money payable under it is represented by the payment of any particular premium.

Consequently, where the owner of a policy on his life by a post-nuptial settlement in 1877 assigned it to trustees for his wife and children, and he himself continued to pay the premiums voluntarily, being under no covenant with the trustees to do so, and in 1899 became bankrupt and died:—

Held, by the Court of Appeal, reversing Wright J., that no part of the payments of premiums during the ten years preceding the bankruptcy was a "settlement" within s. 47 of the Bankruptcy Act, 1883, so as to entitle the trustee in bankruptcy to any proportionate part of the policy moneys. *In re* HARRISON & INGRAM. *Ex parte* WHINNEY - - - C. A. 710

—— Income tax — Assignment for benefit of creditors—Profits made by trustee in carrying on part of insolvent debtor's business - - - - 363
See REVENUE. 4.

BANKRUPTCY RULES, 1886, rr. 117, 285 309
See BANKRUPTCY. 9.

—— **rr. 136, 262, 353 and Appendix, Form 6** 698
See BANKRUPTCY. 2.

—— rr. 170–175 - - - - 429
See BANKRUPTCY. 6.

BICYCLE — *Liability to Toll — "Carriage"—7 Geo. 3, c. lxiii.*

By a special Act passed in 1767, the owner of a bridge across the Thames, and his heirs and assigns, were authorized to take the following (amongst other) tolls for passage over the bridge: "For every coach, chariot, berlin, hearse, chaise, chair, calash, wagon, wain, dray, cart, car, or carriage whatsoever with four wheels the sum of fourpence, and with less than four wheels the sum of twopence":—

Held, that a bicycle ridden over the bridge was a "carriage" within the meaning of the Act, so that the owner of the bridge was entitled to take the toll of twopence in respect of the bicycle. CANNAN *v.* EARL OF ABINGDON - Div. Ct. 66

BILL OF EXCHANGE—*Promissory Note—Note left in hands of Payee after Payment—Negotiation by Payee—Note obtained by Payee from Holder by Fraud—Note returned to Maker—Liability of Maker on Note—Holder for Value—Overdue Note*

BILL OF EXCHANGE—*continued.*

—*Holder "in his own right"—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 61.

In s. 61 of the Bills of Exchange Act, 1882, which enacts that when the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged, the expression "in his own right" is not used in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world.

The defendant gave three promissory notes to cover his indebtedness to the payee, and subsequently two more notes, in substitution for the first three and to cover further advances. All the notes were payable on demand and were given on the understanding that they should not be negotiated. The payee indorsed all five notes generally to the plaintiffs. After the payee had so negotiated the notes the defendant paid to him the amount due on the last two notes, but the defendant was not aware that the payee had parted with the notes, and did not ask for or receive any of them from him. At a later date the payee obtained the five notes from the plaintiffs by fraud, and handed them to the defendant. In an action by the plaintiffs on the notes:—

Held, that the defendant, when he received back the notes, did not become holder for value, since the previous satisfaction of the notes by him was not a consideration given by him when he received back the notes, and that as they were then overdue he acquired no better title than the payee had while they were in his hands, and that the plaintiffs, being entitled to disaffirm the transaction between themselves and the payee, by which the latter obtained possession of the notes, could recover in the action. NASH *v.* DE FREVILLE - - - - C. A. 72

—— Cheque—Defective title—Receiving payment for a "customer"—Liability of banker - - - - 464
See BANKER.

BILL OF LADING—Negligence clause—General average—Charterparty - - 540
See SHIPPING. 3.

BILL OF SALE—*Registration—Validity—Grantor known only under Assumed Name—Bill registered under True Name—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.

An unmarried woman of the name of Ott, about the year 1879, went to live with a man as his mistress and took the name of Mrs. Spencer, by which name alone she was thenceforward known. In 1893 the man made a settlement upon her, and in that settlement she was described by her true name of Ott. In 1899 she executed an absolute deed of assignment of certain personal chattels to the trustees of the settlement, by whom it was registered, and in that deed of assignment and the registration of it she was described by the name of Ott alone, no reference being made to the name of Spencer. The chattels comprised in the deed having been seized in execution of a judgment, the trustees of the settlement claimed them. On the trial of an interpleader issue, it was contended by the execution creditor that the deed, not having been registered in the name of Spencer, was invalid:—

BILL OF SALE—*continued.*

Held, that the Bills of Sale Act, 1878, did not require the name of the grantor to be stated at all, and that, consequently, the insertion in the register of a name other than that by which alone the grantor was known did not invalidate the registration, even though the effect of it was to deprive persons searching the register of all means of ascertaining therefrom whether the grantor was the true owner or not of the chattels which were in her possession. STOKES *v.* SPENCER. HAYDON, CLAIMANT - - Div. Ct. 483

BOOK—Libel—Publication—Circulating library
See DEFAMATION. 170

BREACH OF COVENANT - 535, 609
See LANDLORD AND TENANT. 1, 3.

BROKER—Bankruptcy—Surplus in hands of official assignee of Stock Exchange—Title of trustee in bankruptcy - 504
See BANKRUPTCY. 12.

—— Default of—Principal and agent—Liability of client to jobber—Privity of contract
See STOCK EXCHANGE. 1. 260

—— Lumping several orders in one contract—Liability of principal to jobber on default of broker - - - - 18
See STOCK EXCHANGE. 2.

CABMEN—Public health—Sanitary convenience—Stable—Workplace—Persons in attendance - - - - 397
See LOCAL GOVERNMENT. 1.

CALLS—Forfeited shares—Liquidation—Past member of company - - 376
See COMPANY. 1.

CAPITAL—Reduction of—Special resolution—Irregularity—Certificate of registration
See COMPANY. 1. 376

CAPTURE—Seizure by belligerent government of property of its own subjects—Contract of indemnity—Validity - 339
See INSURANCE, MARINE. 1.

"**CARRIAGE**"—Bicycle—Liability to toll 66
See BICYCLE.

CASES:—*Beckhuson* v. *Hamblet*, [1900] 2 Q. B. 18, followed and approved - 260
See STOCK EXCHANGE. 1.

—— *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, [1897] A. C. 609, undistinguishable - - - 402
See INSURANCE, MARINE. 3.

—— *Bonella* v. *Twickenham Local Board*, (1887) 26 Q. B. D. 63, distinguished - 188
See LONDON. 1.

—— *Carron Park, The*, (1890) 15 P. D. 203, approved of - - - - 540
See SHIPPING. 3.

—— *Emmens* v. *Pottle*, (1885) 16 Q. B. D. 354, discussed - - - - 170
See DEFAMATION.

—— *Lumley, In re, Ex parte Cathcart*, [1894] 2 Ch. 271, followed - - 478
See PRACTICE. 5.

CASES—*continued.*

—— *Lysons* v. *Andrew Knowles & Sons, Limited*, [1900] 1 Q. B. 780, followed - 95
See EMPLOYER AND WORKMAN. 4.

—— *Mackenzie and Ascot Gas Co., In re*, (1886) 17 Q. B. D. 114, overruled - 253
See ARBITRATION. 1.

—— *Moore* v. *Watson*, (1867) L. R. 2 C. P. 314, disapproved of - - - 57
See ARBITRATION. 2.

—— *Player, In re, Ex parte Harvey*, (1885) 15 Q. B. D. 682, approved of - - 790
See BANKRUPTCY. 5.

—— *Reg.* v. *Larner*, (1880) 14 Cox C. C. 497, disapproved - - - - 597
See CRIMINAL LAW. 1.

—— *Reg.* v. *London Justices*, [1895] 1 Q. B. 616, not followed - - - 576
See LICENSING ACTS. 1.

—— *Reg.* v. *Smith*, (1870) L. R. 1 C. C. 266, approved and followed - - 601
See CRIMINAL LAW. 3.

—— *Suffield and Watts, In re*, (1888) 20 Q. B. D. 693, considered - - - 489
See BANKRUPTCY. 3.

—— *Tankard, In re*, [1899] 2 Q. B. 57, 60, 61, approved of - - - - 790
See BANKRUPTCY. 5.

—— *Toke* v. *Andrews*, (1882) 8 Q. B. D. 428, approved - - - - 181
See PRACTICE. 4.

—— *Vansittart, In re*, [1893] 1 Q. B. 181, approved of - - - - 790
See BANKRUPTCY. 5.

—— *Warburton* v. *Haslingden Local Board*, (1879) 48 L. J. (Q. B.) 451, approved - 253
See ARBITRATION. 1.

—— *Wood, In re, Ex parte Fanshawe*, [1897] 1 Q. B. 314, considered - - 489
See BANKRUPTCY. 3.

—— *Wright* v. *Bagnall*, [1900] 2 Q. B. 240, distinguished - - - - 245
See EMPLOYER AND WORKMAN. 8.

CERTIFICATE—Of analyst—Evidence—Margarine—Sale of Food and Drugs Act 413
See ADULTERATION. 2.

CHARGING ORDER—Solicitors' costs—Lien—"Property recovered or preserved" in bankruptcy proceedings—Jurisdiction—Application to discharge order—Delay
See BANKRUPTCY. 3. 489

CHARTERPARTY—Demurrage—Discharge into railway wagons—Deficiency of wagons—Liability of charterer - - 638
See SHIPPING. 2.

—— Demurrage obligation, Continuance of—Delay at loading port - - 12
See SHIPPING. 1.

—— General average—Bill of lading—Negligence clause - - - 540
See SHIPPING. 3.

CHEQUE—Defective title—Receiving payment for a "customer"—Liability of banker
See BANKER. 464

CIRCULATING LIBRARY—Libel—Publication—Book—Negligence - - 170
See DEFAMATION.

COLLECTION OF TAXES—Income tax and inhabited house duty—Distress—Powers of collectors—Expiration of collector's year - - - - - 370
See REVENUE. 1.

COLLISION—Construction of clause—Sum paid "in respect of injury to such other ship or vessel itself"—Expenses of removal of wreck - - - - 348
See INSURANCE, MARINE. 2.

COMPANY—*Calls on Forfeited Shares—Liquidation—Past Member of Company—Reduction of Capital—Special Resolution—Irregularity—Certificate of Registration — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 38, 51—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11, 15, 16.

The articles of association of a company provided that any member whose shares had been forfeited should, nevertheless, be liable to pay all calls owing upon the shares at the time of the forfeiture. The defendant had been the owner of shares in the company, but his shares had been forfeited for non-payment of calls. More than a year after the forfeiture the company went into liquidation, and the defendant was then sued for the unpaid calls:—

Held, that, notwithstanding the provisions of s. 38 of the Companies Act, 1862, sub-ss. 1, 3, the action was maintainable, inasmuch as the defendant was liable, not as a contributory, but as a debtor to the company.

Where the resolution confirming a resolution by a company to reduce its capital did not comply with the terms of s. 51 of the Companies Act, 1862, because there was not an interval of fourteen days between the passing of the two resolutions, but an order of the Court had been made in accordance with the resolutions under s. 11 of the Companies Act, 1867, and the Registrar of Joint Stock Companies had certified the registration of the order, together with a minute approved by the Court, in conformity with s. 15 of that Act:—

Held, that the certificate of the registrar was conclusive evidence that a special resolution to reduce the capital of the company had been duly passed in accordance with s. 51 of the Companies Act, 1862, and s. 9 of the Companies Act, 1867.
LADIES' DRESS ASSOCIATION, LIMITED *v.* PULBROOK
C. A. 376

2. —— *Winding-up — Creditor's Petition — Right of Creditor to Winding-up Order — Indemnity.*

An unpaid creditor of a company is not entitled to a winding-up order unless he can shew that the general body of the creditors will derive benefit from the order being made; it is not enough for him to shew that he himself will be benefited by it.

A company, which had not sufficient assets to satisfy the claims of its debenture-holders, took legal proceedings for the recovery of a debt and failed, and was ordered to pay costs to the successful party. The debt in question purported to form part of the security for the payment of

COMPANY—*continued*

the debentures, and had it been recovered the debenture-holders alone would have been benefited thereby. The successful party, failing to get payment of his costs from the company, applied to the Court for a winding-up order with a view to compelling the company to enforce its right of indemnity for the costs against the debenture-holders for whose benefit the legal proceedings had been taken:—

Held, that, as the enforcement of the right of indemnity would confer no benefit upon the general body of the creditors, the winding-up order ought not to be granted. *In re* GREENWOOD & Co. - - - - - **Div. Ct. 306**

3. —— *Winding-up — Liquidator — Appointment of Liquidator after Winding-up Order — Official Receiver—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 4, 6.

After an order for the winding-up of a company has been made, the Court has no power to appoint a liquidator other than the official receiver until an application has been made under s. 6 of the Companies (Winding-up) Act, 1890, for the appointment of a liquidator in his place. *In re* JOHN REID & SONS, LIMITED **Div. Ct. 634**

—— Estate duty—Succession duty—Disposition by foreigner domiciled abroad—Property situate abroad—Disposition to English company - - - **556**
See REVENUE. 2.

COMPENSATION—"Full compensation"—Costs of legal proceedings—Extra costs **423**
See PRACTICE. 2.

—— Lease of colliery—Right of lessee to sink shaft in land of lessor not included in demise - - - - **677**
See LANDS CLAUSES ACTS.

—— Workmen's Compensation Act.
See Cases under EMPLOYER AND WORKMAN.

CONDITION—Contract — Impossibility of performance—Implied condition—Measure of damages - - - - **298**
See CONTRACT.

CONTEMPT OF COURT—*Publication of Comments on Administration of Justice—Personal Abuse of Judge with Reference to his Conduct as Judge.*

The publication in a newspaper of an article containing scurrilous personal abuse of a judge, with reference to his conduct as a judge in a judicial proceeding which has terminated, is a contempt of Court punishable by the Court on summary process. THE QUEEN *v.* GRAY **Div. Ct. 36**

CONTRACT—*Impossibility of Performance—Implied Condition—Measure of Damages.*

By a contract made in October, 1899, the defendants sold to the plaintiffs a cargo of cotton-seed, to be shipped at certain Egyptian ports during the month of January, 1900, per steamship *Orlando*, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that, "In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be

CONTRACT—*continued.*

cancelled." In December, 1899, the *Orlando* was, without default on the part of the defendants, stranded, and was so much damaged as to render it impossible for her to arrive at the ports of loading before the end of January; and on December 20 notice of that fact was given to the plaintiffs. Upon receipt of that notice the plaintiffs might have bought in the market another cargo of cotton-seed in substitution for that sold to them by the defendants, but they declined to do so. The market was rising, and by the end of January the market price had risen considerably above the point at which it stood at the time when the plaintiffs had notice of the stranding. The plaintiffs sued the defendants for breach of their contract, claiming as damages the difference between the contract price and the market price at the end of January:—

Held, that the contract must be read as subject to an implied condition that, in the event of the ship not arriving at the ports of loading within the stipulated time in a fit state to receive the cargo, the contract should be treated as at an end; that the implication of that condition was not excluded by the clause expressly providing for the cancellation of the contract in the specified events; and that the defendants were not liable.

Semble, that if the plaintiffs had been entitled to recover, inasmuch as they were under the circumstances bound to endeavour to mitigate the loss, the measure of their damages would have been the difference between the contract price and the market price at the date when they had notice of the stranding, and no more. NICKOLL & KNIGHT *v.* ASHTON, EDRIDGE & Co. **Mathew J. 298**

—— Marine insurance.
See Cases under INSURANCE, MARINE.

—— Party wall—Implied contract to pay half cost of—Adjoining owners - **129**
See PARTY WALL.

—— Privity of contract—Broker, Default of—Liability of client to jobber—Principal and agent - - - - **260**
See STOCK EXCHANGE. 1.

—— Wagering—Undischarged bankrupt—After-acquired property—Personal earnings
See BANKRUPTCY. 13. **497**

—— Wife's contracts during coverture—Judgment after cessation of coverture — Separate property—Restraint upon anticipation - - - - **784**
See HUSBAND AND WIFE.

CONTRACTOR—Railway company—Accident to contractor's workman—Work ancillary to business of undertaker - - **100**
See EMPLOYER AND WORKMAN. 13.

—— "Undertaker"—Construction of building—Contractor for supply of labour - **406**
See EMPLOYER AND WORKMAN. 9.

CONVEYANCING AND LAW OF PROPERTY—Covenant not to assign—Equitable assignment—Declaration of trust—Forfeiture—Service on "lessee" - **267**
See LANDLORD AND TENANT. 2.

CONVEYANCING AND LAW OF PROPERTY—*continued.*

—— Lease by mortgagor in possession—Foreclosure by mortgagee—Lease binding on mortgagee - - - 653
See MORTGAGE.

COSTS—Arbitration—Costs of reference, whether taxable on high or county court scale
See ARBITRATION. 2. 57

—— Bankruptcy — Taxation — Trustee—Committee of inspection—Employment of solicitor - - - - 309
See BANKRUPTCY. 9.

—— County court—Order for payment of costs—Action not maintainable on county court order - - - - 719
See COUNTY COURT. 2.

—— "Full compensation"—Public Health Act—Costs of legal proceedings—Extra costs - - - - 423
See PRACTICE. 1.

—— Justices—Appeal against refusal to renew licence—Indemnity costs, Right to 576
See LICENSING ACTS. 1.

—— Licensing justices' on successful appeal—Taxation - - - - 666
See LICENSING ACTS. 3.

—— Party wall—Implied contract to pay half cost of—Adjoining owners - 129
See PARTY WALL.

—— Public authority—Action against—Discretion to deprive successful defendants of costs—"Good cause" - - 616
See PRACTICE.

—— Remitted action—Judgment under Order XIV. for part of claim—Judgment for defendant in county court - 124
See COUNTY COURT. 1.

—— Sequestration—Payment of costs—Service
See PRACTICE. 5. 478

—— Solicitors' lien—Charging order—"Property recovered or preserved" in bankruptcy proceedings—Jurisdiction - 489
See BANKRUPTCY. 3.

COUNTER-CLAIM—In reply—Pleading - 181
See PRACTICE. 4.

COUNTY COURT—*Costs—Remitted Action—Judgment under Order XIV. for Part of Claim—Judgment for Defendant in County Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 113.

In an action brought in the High Court to recover 20*l.* 2*s.* as the price of goods sold and delivered, an order was made under Order XIV. by which leave was given to the plaintiffs to sign judgment for 8*l.* 14*s.* if that amount was not paid within seven days, and leave was given to the defendant to defend as to the residue of the claim, and it was ordered, under s. 65 of the County Courts Act, 1888, that the action should be tried in the county court. The defendant paid the sum of 8*l.* 14*s.* under the order, and at the trial in the county court judgment was given for him, no order being made as to costs:—

Held, that, the plaintiffs having succeeded in the action in recovering the sum of 8*l.* 14*s.*, the defendant was not entitled to costs, although he had obtained judgment in the county court. WRIGHT & SON *v.* BULL - - Div. Ct. 124

2. —— *Order for Payment of Costs—Action not Maintainable on County Court Order.*

An action is not maintainable upon an order of a county court for payment of costs. FURBER *v.* TAYLOR - - - - C. A. 719

COVENANT—Breach of covenant—Ejectment for—Mortgagor in possession - 535
See LANDLORD AND TENANT. 3.

—— Not to assign—Forfeiture—Equitable assignment—Declaration of trust—Service on "lessee" - - - 267
See LANDLORD AND TENANT. 2.

—— Quiet enjoyment — Breach of covenant against assignment—Subsequent assignment of reversion—Re-entry—Consent judgment - - - - 609
See LANDLORD AND TENANT. 1.

CREDITOR—Bankruptcy practice.
See Cases under BANKRUPTCY.

—— Winding-up order, Right of creditor to—Indemnity - - - - 306
See COMPANY. 2.

CRIMINAL LAW — *False Pretences — Athletic Sports—Competitor in Handicap — False Statements as to Name and Performances—Attempt to obtain Prize.*

On the trial of an indictment for attempting to obtain property by false pretences the following facts were proved.

Entries for two handicaps were sent to the secretary of an athletic meeting, in the name of Sims, containing statements as to the recent performances of Sims, which were very moderate, and in consequence Sims was given long starts. The entries were not written by either Sims or the prisoner. At the meeting the prisoner, who was a good runner, personated Sims, who was absent, and came in first in both races. After the first race the handicapper asked the prisoner whether he was really Sims, whether the performance given in the entry form was really his, and whether he had never won a race, as stated in the entry. He answered these questions, falsely, in the affirmative.

On a case stated:—

Held, that the attempt to obtain the prizes was not too remote from the pretence, that the case was rightly left to the jury, and the prisoner was properly convicted.

Reg. v. *Larner*, (1880) 14 Cox C. C. 497, disapproved. THE QUEEN *v.* BUTTON C. C. R. 597

2. —— *False Pretences—Evidence—Admissibility—Proof of Guilty Knowledge—Acts in respect of which Defendant had been previously acquitted.*

The defendant was indicted for obtaining a cheque by falsely pretending that another cheque which he then gave to the prosecutor, was a good and valid order for the payment of money. The prosecutor deposed that he gave his cheque to the defendant on the faith of the defendant's statement that a cheque, which the defendant then gave to the prosecutor, was a good cheque. The cheque given by the defendant was dis-

CRIMINAL LAW—*continued.*
honoured. The defendant stated that when he gave the cheque he expected a payment which would have enabled him to meet it. The defendant was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three cheques which were dishonoured. To prove guilty knowledge the prosecutor in the first case was called and gave the same evidence as in the first case. The defendant was convicted, and the question as to the admissibility of the evidence was reserved :—

Held, by Lord Russell of Killowen C.J., Mathew, Grantham, Wright, Darling, and Channell JJ. (Bruce and Ridley JJ. dissenting), that the evidence which had been given on the first indictment, upon which the defendant had been tried and acquitted, was legally admissible upon the trial of the second indictment, for the purpose of proving guilty knowledge, and the conviction was right. THE QUEEN *v.* OLLIS - **C. C. R. 758**

3. —— *Receiving—Property Stolen by Wife from Husband—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 91—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 12, 16.

Two prisoners, a man and a woman, were indicted for stealing property in a dwelling-house, and, in a second count, for receiving the same property. The woman was the prosecutor's wife, and the man had lodged in their house. After he left, the woman packed up the property in question, and sent it to the man, and afterwards left the house, and joined him, and the two lived together. The property was found in their possession. The jury found the woman guilty of stealing, and the man of receiving. The question was reserved, whether the man could be indicted for receiving the property :—

Held, that, as the stealing by a wife of her husband's property did not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but was made a criminal offence by the Married Women's Property Act, 1882, ss. 12, 16, the man was not liable to be convicted under the Larceny Act, 1861, s. 91, of receiving property stolen by the woman from her husband, and the conviction was wrong.

Reg. v. *Smith*, (1870) L. R. 1 C. C. 266, approved and followed. THE QUEEN *v.* STREETER **C. C. R. 601**

CUSTOMER—Broker, Bankruptcy of—Surplus in hands of official assignee of Stock Exchange—Title of trustee in bankruptcy
See BANKRUPTCY. 12. **504**

—— Cheque—Defective title—Receiving payment for a "customer"—Liability of banker - - - - **464**
See BANKER.

DAMAGES—Measure of—Contract—Impossibility of performance—Implied condition - - - - - **298**
See CONTRACT.

DEBTOR—Bankruptcy practice.
See Cases under BANKRUPTCY.

DEFAMATION—*Libel—Publication—Circulating Library—Book circulated in Ignorance of Libel contained in it—Negligence.*

The proprietors of a circulating library circulated copies of a book which, unknown to them, contained a libel on the plaintiff. In an action for libel brought against them by the plaintiff, they failed to shew that it was not through negligence on their part that they did not know that the book contained the libel when they circulated it :—

Held, that they were liable as publishers of the libel.

Emmens v. *Pottle*, (1885) 16 Q. B. D. 354, discussed. VIZETELLY *v.* MUDIE'S SELECT LIBRARY, LIMITED - - - - - **C. A. 170**

DELAY—Charging order—Application to discharge—Ex parte proceedings—Practice
See BANKRUPTCY. 3. **489**

—— Charterparty—Demurrage obligation, Continuance of—Delay at loading port **12**
See SHIPPING. 1.

DEMURRAGE—Charterparty—Delay at loading port—Continuance of demurrage obligation - - - - **12**
See SHIPPING. 1.

—— Discharge into railway wagons—Deficiency of wagons—Liability of charterer **638**
See SHIPPING. 2.

DISCHARGE—Charging order—Application to discharge—Ex parte proceedings—Delay—Practice - - - **489**
See BANKRUPTCY. 3.

DISCOVERY—Privilege—Communications between solicitor and client—Evasion of statute - - - - **163**
See PRACTICE. 3.

DISSOLUTION—Partnership—Writ against firm after dissolution—Judgment against late firm—Liability of partners - **698**
See BANKRUPTCY. 2.

DISTRESS—Collection of taxes—Powers of collectors—Expiration of collector's year
See REVENUE. 1. **370**

DOCUMENTS—Production of—Privilege—Communications between solicitor and client—Evasion of statute - - **163**
See PRACTICE. 3.

DRUGS—Sale of food and.
See Cases under ADULTERATION.

DRUNKENNESS—Incapacity resulting from—Vagrancy—Wilful refusal or neglect of person to maintain himself - **695**
See POOR LAW. 2.

DUTY—Public revenue.
See Cases under REVENUE.

EARNINGS—Undischarged bankrupt—After-acquired property—Interpleader—Wagering contract - - - **497**
See BANKRUPTCY. 13.

EJECTMENT—Mortgagor in possession—Ejectment for breach of covenant - **535**
See LANDLORD AND TENANT. 3.

EMPLOYER AND WORKMAN—*Compensation—Accident arising out of and in Course of Employment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1, *sub-s.* 1.

An engine-cleaner, who had been employed by a railway company at their station at K., was directed by his employers to work in a new engine-shed at H., about four miles distant. The workman, who lived near K., was conveyed by the railway company free of charge in one of their trains to their station at H., reaching there a short time before the hour for commencing work in the shed, and was taken back free of charge at the end of his day's work. While crossing the line at the station at H. in order to get to his work in the engine-shed, and shortly before the hour at which work began, he was killed by a passing train:—

Held, that the employment of the workman commenced when he got into the train to be conveyed to his work, and not on his arrival at the engine-shed, and that the accident arose out of and in the course of his employment within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897. HOLMES *v.* GREAT NORTHERN RAILWAY COMPANY - C. A. 409

2. —— *Compensation—Amount of Compensation—Accident causing Injury—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clauses* 1 (*b*), 2.

Sched. I., clause 2, of the Workmen's Compensation Act, 1897, which provides that in fixing the amount of a weekly payment regard is to be had to the difference between the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, does not operate so as necessarily to cut down the maximum rate of compensation allowed by clause 1 (*b*) of the schedule. ILLINGWORTH *v.* WALMSLEY - C. A. 142

3. —— *Compensation—Arbitration—Time for commencing Proceedings—"Claim for Compensation"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-s.* 1.

By s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, proceedings for the recovery under that Act of compensation for an injury are not to be maintainable unless notice of the accident has been given as soon as practicable, "and unless *the* claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury. . . . ."

A workman who had been injured in the course of his employment sent to his employers within six months a notice of the accident, and also a notice stating that he claimed compensation for the injury received by him. More than six months after the accident he filed a request for arbitration in the county court:—

Held, by A. L. Smith L.J. and Collins L.J., Romer L.J. dissenting, that "*the* claim for compensation" contemplated by s. 2, sub-s. 1, was the initiation of proceedings before the tribunal by which the compensation was to be assessed, and not a mere notice of a claim for compensation sent to the employers of the workman; that the request for arbitration should, therefore, have been filed within six months of the accident, and

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the proceedings were consequently out of time. POWELL *v.* MAIN COLLIERY COMPANY C. A. 145

4. —— *Compensation—Employment for less than Two Weeks—Death caused by Accident—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *First Schedule* (1) (*a*), (*i.*).

The dependants of a workman whose death has been caused by an accident arising out of and in the course of his employment are not entitled to compensation under the Workmen's Compensation Act, 1897, unless the workman at the time of the accident has been for at least two weeks in the employment of the employer.

Lysons v. *Andrew Knowles & Sons, Limited*, [1900] 1 Q. B. 780, followed. STUART *v.* NIXON & BRUCE - - - - - C. A. 95

5. —— *Compensation—Investment for Benefit of Dependants—Proceedings by Legal Personal Representative of Workman—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clauses* 4, 5, 6, 7.

Where an application for compensation under the Workmen's Compensation Act, 1897, is made by the legal personal representative of a deceased workman on behalf of himself and other dependants of the workman, the county court judge or other arbitrator has jurisdiction under Sched. I., clauses 4–7, to order so much of the compensation as is allotted to the dependants to be paid to the county court registrar for investment in his name on their behalf, and is not compelled to order it to be paid to the legal personal representative. DANIEL *v.* OCEAN COAL COMPANY - C. A. 250

6. —— *Compensation—Review of Weekly Payment—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 12.

An application under Sched. I., clause 12, of the Workmen's Compensation Act, 1897, for the review of a weekly payment cannot be entertained, where there has been no change in the circumstances of the case since the weekly payment was awarded.

Per A. L. Smith and Romer L.JJ., Vaughan Williams L.J. doubting. CROSSFIELD & SONS, LIMITED *v.* TANIAN - - - C. A. 629

7. —— *Compensation—Time for making Claim—Claim made more than Six Months after Accident—Employers debarred from raising Objection—Estoppel—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-s.* 1.

The provision of s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, which requires the claim for compensation to be made within six months of the occurrence of the accident causing the injury, is not necessarily an absolute bar to proceedings for the assessment of compensation commenced after six months by an injured workman, and the county court judge or other arbitrator has jurisdiction to inquire whether there are any circumstances in the case to debar the employer from raising that defence. An agreement arrived at between the parties shortly after the accident that there is a statutory liability on the employer to pay compensation, the amount of compensation being left open for future settlement, is evidence upon which the judge or arbitrator may properly find that the employer is

EMPLOYER AND WORKMAN—*continued.*

estopped from setting up the defence that the request for arbitration was not filed within six months of the accident. WRIGHT *v.* JOHN BAGNALL & SONS, LIMITED - - - **C. A. 240**

8. —— *Compensation—Time for making Claim —Claim made more than Six Months after Accident—Estoppel — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 2, *sub-s.* 1.

A workman having been injured by an accident, his employers paid him weekly through an insurance company one-half the amount of his wages, taking a receipt which expressed that the money was received "on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897"; the payments continued to be made for ten months after the accident, when they ceased. The workman then filed a request for arbitration in the county court:—

Held, that, there being no evidence of any admission on the part of the employers of their liability under the Act to pay compensation, they were not estopped from taking the objection that the request for arbitration was out of time.

Wright v. *Bagnall*, [1900] 2 Q. B. 240, distinguished. RENDALL *v.* HILL'S DRY DOCKS AND ENGINEERING COMPANY - - **C. A. 245**

9. —— *Compensation—"Undertaker"—Construction of Building—Contractor for Supply of Labour — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

An employer who, under a contract with a firm engaged in building operations on their own premises, supplies the labour for the brickwork, the workmen so supplied, although paid by him, being under the control while at work of the foreman of the building owners, is not an undertaker within the meaning of the Workmen's Compensation Act, 1897. PERCIVAL *v.* GARNER **C. A. 406**

10. —— *Jurisdiction of Justices—Absence of Workman without Leave—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 4—*Truck Art*, 1896 (59 & 60 *Vict. c.* 44), *s.* 1.

The jurisdiction of a court of summary jurisdiction under the Employers and Workmen Act, 1875, to hear and determine a dispute under that Act between an employer and a workman is not ousted by reason of the agreement of service being one to which the provisions of s. 1 of the Truck Act, 1896, apply. BUXTON LIME FIRMS COMPANY *v.* HOWE - - - **Div. Ct. 232**

11. —— *Medical Examination — Notice of Accident not given—Examination of Workman by Medical Practitioner, Right of Employer to—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 2; *First Schedule*, *s.* (3).

Where a workman, who took proceedings under the Workmen's Compensation Act, 1897, had not given notice of the accident as required by s. 2 of the Act, but the employers raised no objection to his claim on that ground:—

Held, that, although the workman had not given notice of the accident, the employers were entitled to require him to submit himself for medical examination in pursuance of s. (3) of the First Schedule to the Act; and that the county court judge had no jurisdiction to impose any term upon them as a condition of the workman's being bound to do so. OSBORN *v.* VICKERS, SONS & MAXIM - - - - - **C. A. 91**

12. —— *Negligence of Servant — Omnibus driven by Conductor—Onus of proving Authority.*

At the end of a journey the conductor of an omnibus belonging to the defendants, in the absence of the driver, and apparently for the purpose of turning the omnibus in the right direction for the next journey, drove it through some by-streets at a considerable pace, and while so doing negligently ran into and injured the plaintiff. At the trial the plaintiff gave no evidence that the conductor was authorized by the defendants to drive the omnibus in the absence of the driver. At the close of the plaintiff's case judgment was entered for the defendants. On appeal:—

Held, by A. L. Smith and Romer L.JJ., that the plaintiff had not discharged himself from the burden cast upon him of shewing that the injury was due to the negligence of a servant of the defendants acting within the scope of his employment, and that the defendants were entitled to judgment.

By Vaughan Williams L.J., that in general, if, in the absence of the driver of an omnibus, an accident occurs while the conductor is driving, it would be for the proprietor to shew that the act was unauthorized, but that the facts of the particular case negatived the giving of authority, and that the defendants were entitled to retain the judgment. BEARD *v.* LONDON GENERAL OMNIBUS COMPANY - - - **C. A. 530**

13. —— *Railway Company—Accident to Contractor's Workman—Work ancillary to Business of Undertakers — Erection of Station — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 4, 7.

The erection of a railway station is work "which is merely ancillary or incidental to, and is no part of, or process in, the trade or business" of a railway company within the meaning of s. 4 of the Workmen's Compensation Act, 1897; and therefore the railway company are not liable to pay compensation under that Act to the workman of a contractor, who has contracted with them to do such work, in respect of an injury occasioned to the workman in the execution of it. PEARCE *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY - - - - - **C. A. 100**

ESTATE DUTY—Disposition by foreigner domiciled abroad—Property situate abroad—Disposition to English company **556**
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ESTOPPEL — Workmen's Compensation Act — Time for making claim - **240, 245**
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EVIDENCE — Admissibility — False pretences—Proof of guilty knowledge - **758**
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—— Certificate of analyst—Margarine—Sale of Food and Drugs Act - - **413**
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FALSE PRETENCES — Athletic sports — False statements as to name and performances —Attempt to obtain prize. - 597
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—— Evidence—Admissibility—Proof of guilty knowledge - - - - 758
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FALSE TRADE DESCRIPTION—"Applied" to goods — Representation implied from conduct - - - - 460
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FORECLOSURE—Lease by mortgagor in possession—Foreclosure by mortgagee—Lease binding on mortgagee - - 653
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FOREIGNER—Succession duty—Disposition by Foreigner domiciled abroad—Property situate abroad—Disposition to English company - - - - 556
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FORFEITURE—Covenant not to assign—Equitable assignment—Declaration of trust—Service on "lessee" - - 267
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FRAUD—Promissory note returned to maker—Liability of maker on note—Overdue note—Holder "in his own right" 72
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FRAUDULENT CONVEYANCE — Voluntary settlement—Discretionary trust to pay future debts — Intent to defeat and delay future creditors - - 508
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FRAUDULENT PREFERENCE—Money lent for a special purpose — Repayment after act of bankruptcy—Dominant view of debtor - - - - 325
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—— Payment of creditor with a view to prefer surety - - - - 138
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FREIGHT—General average—Sacrifice of freight
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—— Loss of—Exception—"Claim consequent on loss of time" - - - 402
See INSURANCE, MARINE. 3.

"**FURNITURE**"—What included under term—Policy on ship - - - 283
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GAME—*Ground Game—Landlord and Tenant—Right given to Occupier—Agreement to Alienate—Advantages in Consideration of Forbearing to Exercise — Agreement to leave Game unshot — Claim for Compensation—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *s.* 3.

A statement of claim alleged that the plaintiff became tenant to the defendant of a farm, induced by a promise that, if the plaintiff left the ground game unshot for the defendant's benefit, the defendant would compensate the plaintiff for damage done to the plaintiff's crops by the ground game; that the plaintiff allowed the ground game to go unshot, and the defendant shot over the farm; and the growing crops of the plaintiff were damaged by the ground game, and the plaintiff claimed compensation.

The defendant pleaded that the agreement was void in law by reason of the Ground Game Act, 1880, s. 3, and the statement of claim disclosed no cause of action.

On argument of the point raised on the pleadings:—

Held, that the agreement purported to alienate the right given by the Act to the occupier to kill and take the ground game, and purported to give the occupier an advantage in consideration of his forbearing to exercise his right, within the meaning of s. 3, and was therefore void, and the plaintiff was not entitled to recover. SHERRARD *v.* GASCOIGNE - - - **Div. Ct. 279**

2. —— *Ground Game—"Occupier of Land"—Owner occupying his own Land—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *s.* 1.

An owner occupying his own land is an "occupier of land" within the meaning of the Ground Game Act, 1880, s. 1.

The owner of land granted to the plaintiff a lease of the exclusive right of sporting upon the land, and subsequently, during the currency of the lease, sold and conveyed the freehold to the defendant, who entered into occupation of the land. The defendant caused rabbits on the land to be trapped, claiming as occupier a right to do so under the provisions of the Ground Game Act, 1880, whereupon the plaintiff brought an action against him for infringement of the plaintiff's exclusive right of sporting:—

Held (by Vaughan Williams L.J. and Romer L.J., A. L. Smith L.J. dissenting), that the defendant, being the occupier, was entitled under the Ground Game Act, 1880, to kill the ground game, none the less because he happened to be also the owner.

Decision of Wright J., [1899] 2 Q. B. 436, affirmed. ANDERSON *v.* VICARY - **C. A. 287**

GAMING — Undischarged bankrupt — After-acquired property—Personal earnings—Interpleader—Wagering contract 497
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HACKNEY CARRIAGE—Negligence of servant—Omnibus driven by conductor—Onus of proving authority - - - 530
See EMPLOYER AND WORKMAN. 12.

HIGHWAY—*Extraordinary Traffic—Person by or in Consequence of whose Order such Traffic has been conducted—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12.

The defendants, on March 2, 1898, entered into a contract with a firm to carry out for them certain building operations; and on March 16, 1898, they entered into another contract with another firm for the erection of temporary buildings. The work under the first contract was completed on April 15, 1899, and under the second contract on September 23, 1899. In the course of executing these contracts extraordinary traffic was conducted over certain highways within the plaintiffs' highway district, and they were put to extraordinary expenses in repairing them. In an action commenced on December 22, 1899, to recover these expenses from the defendants:—

Held, that the plaintiffs were entitled to succeed, since the extraordinary traffic had been conducted "by or in consequence of" the order of the defendants, within the meaning of s. 12 of the Locomotives Act, 1898, but that the proceedings to recover the amount in respect of the damage caused in the execution of the first contract were too late, having been commenced more than six months after the completion of that contract. EPSOM URBAN DISTRICT COUNCIL *v.* LONDON COUNTY COUNCIL - Bigham J. 751

2. —— *Tolls—Exemption—Carriage employed in Military Service of Crown—Turnpike Acts—Army Act*, 1881 (44 & 45 *Vict. c.* 58), *s.* 143.

The exemption from payment of toll in passing along a turnpike road or over a bridge contained in s. 143 of the Army Act, 1881, in favour of carriages "employed" in the military service of the Crown and conveying officers or soldiers of the regular forces on duty does not extend to the private carriage of an officer used by him for his own convenience while on duty. CRAIG *v.* NICHOLAS - - - Div. Ct. 444

HOUSE DUTY—Annual value—Full and just yearly rent - - - - 735
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—— Collection of taxes—Distress—Powers of collectors—Expiration of collector's year
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HUSBAND AND WIFE—*Married Women's Property Acts—Wife's Contracts during Coverture—Judgment after Cessation of Coverture—Separate Property—Restraint upon Anticipation—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.

By the Married Women's Property Act, 1893, s. 1, "Every contract hereafter entered into by a married woman .... (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to; Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

A married woman, who was possessed of separate property the income of which she was restrained from anticipating, entered into a contract, and was subsequently divorced. Judgment having then been obtained against her, it was sought to enforce it, by means of a garnishee order attaching income which had accrued due to her from this property subsequently to the divorce:—

Held, that this income was protected by the proviso to the section, and could not be attached. BARNETT *v.* HOWARD. UNION BANK OF LONDON, GARNISHEES - - - - C. A. 784

—— Receiving—Property stolen by wife from husband—Larceny - - 601
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—— Salary — Deductions — Contribution for superannuation allowance - 204
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INDEMNITY — Contract of—Validity—Seizure by belligerent government of property of its own subjects - - - 339
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—— Costs of justices—Indemnity costs, Right to—Appeal against refusal to renew licence - - - - 576
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See Cases under EMPLOYER AND WORKMAN.

INSURANCE, LIFE—Premiums—Voluntary payment by settlor—Bankruptcy by settlor—Policy moneys—Proportion not represented by each premium - - 710
See BANKRUPTCY. 16.

INSURANCE, MARINE—*Capture—Property of Alien Enemy—Existing State of War—Intention to wage War—Seizure by belligerent Government of Property of its own Subjects—Contract of Indemnity—Validity.*

The principle of law which invalidates insurance of an alien enemy's property does not apply to insurance against seizure by a belligerent government of the property of its own subjects.

Gold, the property of a company carrying on business in the Transvaal, was insured with British underwriters, by a policy containing a clause against capture, for transit from mines in the Transvaal to the United Kingdom, and during transit was seized by the Transvaal Government. The policy was made, and the loss occurred, before the actual commencement of hostilities between Her Majesty's Government and the Transvaal. The company sued on the policy, and the underwriters defended on the ground that the plaintiffs were alien enemies, and the loss was by arrest, restraint, or detainment by the Transvaal Government, incidental to actual or expected hostilities against Her Majesty, and made for a purpose connected therewith, namely, to supply that Government with funds with which to levy war on Her Majesty. It was agreed that no dilatory plea should be set up based upon the fact that the plaintiff company was alien and could not sue while the war lasted, but the case should be dealt with as if the war were over:—

Held, that the intention of the Transvaal Government to wage war subsequently could not be treated as creating an actual state of war, and that the commencement of the war, which took place a few days later, could not have the effect of making the seizure a hostile act:

Held, also, that the subsequent breaking out of war did not invalidate the contract of insurance, and the plaintiffs were entitled to recover. DRIEFONTEIN CONSOLIDATED GOLD MINES *v.* JANSON. WEST RAND CENTRAL GOLD MINES COMPANY *v.* DE ROUGEMONT - Mathew J. 339

2. —— *Collision Clause—Construction—Sum paid "in respect of Injury to such other Ship or Vessel itself"—Expenses of Removal of Wreck.*

By a collision clause in a policy of marine insurance on ship the underwriters agreed that, if the ship assured should come into collision with any other ship or vessel, and the assured should in consequence thereof be found liable to pay, and should pay, any sums, not exceeding the value of the ship assured "in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel," they would pay the assured a certain proportion of the sums so paid, but it was provided that this agreement should not be construed as extending to any sums the assured might become liable to pay in respect of loss of life or personal injury to individuals from any cause whatever.

INSURANCE, MARINE—*continued.*

The ship assured having come into collision with and sunk a tug in a river, commissioners acting under statutory powers removed the wreck, and claimed the expenses of so doing from the tug-owners, who paid them, and recovered the amount so paid in the Court of Admiralty from the assured:—

Held, that the collision clause did not cover the sum so recovered from the assured, inasmuch as it was not paid "in respect of injury to such other ship or vessel itself." BURGER *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY C. A. 348

3. —— *Freight, Loss of—Exception—"Claim consequent on Loss of Time."*

A policy of insurance was effected on the outward voyage of a steamer from London to Australian ports for freight expected to be earned on the homeward voyage, the subject-matter being described as "upon freight of frozen meat, chartered or as if chartered"; the policy was warranted "free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." The ship, which was a general ship, having three of her five holds fitted with refrigerating machinery for frozen meat, arrived at Sydney on her outward voyage, and while discharging her outward cargo a serious fire broke out on board which destroyed the refrigerating apparatus, in consequence of which it became impossible to carry frozen meat upon the return voyage to England. In an action on the policy for total loss of freight on frozen meat:—

Held, that the case could not be distinguished from *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, [1897] A. C. 609, on the ground that the freight was not chartered freight; that the claim was therefore consequent on loss of time within the meaning of the exception, and that the underwriters were not liable. TURNBULL, MARTIN & Co. *v.* HULL UNDERWRITERS' ASSOCIATION, LIMITED - - Mathew J. 402

4. —— *"Furniture," What included under term—Policy on Ship.*

Where a ship was usually employed in the Black Sea grain trade, and it was necessary under the circumstances of that trade that she should be provided with separation cloths and dunnage mats for the proper carriage of her cargo:—

Held (affirming the judgment of Bigham J., [1899] 2 Q. B. 401), that a time policy upon the ship and her furniture covered a loss of such cloths and mats, although at the time when the loss occurred the vessel was not engaged in the before-mentioned trade, and the cloths and mats were not in use but stowed away in the forepeak. HOGARTH *v.* WALKER - - - C. A. 283

5. —— *Policy—Ship Valued for Policy at less than Real Value—General Average Loss—Salvage—Liability of Underwriter.*

The defendants insured the plaintiffs' ship for 33,000*l.*, the ship being valued in the policy at that sum. During the currency of the policy a general average loss was sustained and a salvage claim had also to be paid. In the salvage action and the average statement the value of

INSURANCE, MARINE—*continued.*
the ship was fixed at 40,000*l.*, and the rights of all parties were adjusted on that footing. In an action on the policy:—
Held, that the defendants were only liable to make good to the plaintiffs thirty-three-fortieths of the salvage and general average losses.
STEAMSHIP BALMORAL COMPANY *v.* MARTEN
Bigham J. 748

6. —— *Seaworthiness—Implied Warranty of.*
By a policy of marine insurance on cattle it was provided that the fittings of the ship were to be approved by Lloyd's surveyor. The fittings were in fact so approved. During the voyage a large number of the cattle died, owing partly to the insufficiency of the appliances for ventilation and partly to the insufficient number of cattle-men appointed to attend to them:—
Held, that the ship was unseaworthy in both respects, that the implied warranty of seaworthiness was not excluded by the provision as to the approval of the fittings, and that the underwriters were not liable. SLEIGH *v.* TYSER
Bigham J. 333

7. —— *Wagering Policy—Insurable Interest—"P.p.i. Clause"—"Ship"—Marine Insurance Act*, 1745 (19 *Geo.* 2, *c.* 37), *s.* 1.
A policy of marine insurance whereby the assured is entitled to be indemnified against loss in respect of the non-arrival of a ship at a certain port by a certain date is a policy of insurance on the ship within the meaning of 19 Geo. 2, c. 37, s. 1.
Where, on the trial of an action, the plaintiff's case discloses that the transaction which is the basis of his claim is illegal, the Court cannot properly ignore the illegality or give effect to the claim, even if the illegality be not pleaded or relied on by the defendants. The Court will, therefore, not enforce a policy of marine insurance which is illegal under 19 Geo. 2, c. 37, s. 1, by reason of its containing a clause that the policy itself is to be deemed a full and sufficient proof of interest, although that defence is not set up by the underwriters. GEDGE *v.* ROYAL EXCHANGE ASSURANCE CORPORATION
Kennedy J. 214

INTERPLEADER — Undischarged bankrupt — After-acquired property—Personal earnings—Wagering contract - - 497
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—— Justices — Lunatic, Pauper — Reception order — Workhouse situate outside union - - - - 391
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—— Prohibition — Salford Hundred Court of Record - - - - 43
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—— False pretences — Athletic sports — False statement as to name and performances
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—— False pretences — Evidence—Admissibility —Proof of guilty knowledge - 758
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—— False trade description — "Applied" to goods — Representation implied from conduct - - - - 460
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—— Jurisdiction—Lunatic, Pauper — Reception order—Workhouse situate outside union
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—— Licensing Acts.
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—— Merchandise marks — Offence of selling goods to which false trade-mark is applied—Acting innocently - 522
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—— Pauper — Removal of — Irremovability — Break of residence - - - 111
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—— Public health—Costs of legal proceedings—"Full compensation" — Extra costs—Local government - - - 423
See PRACTICE. 2.

—— Public health — Sanitary convenience — Stable—Workplace—Persons in attendance—Cabmen - - - 397
See LOCAL GOVERNMENT. 1.

—— Rates—Statute—Implied appeal — Exemption from taxes and assessments—City of London - - - - 581
See STATUTE.

—— Rates, Duty of sheriff to pay —Goods "taken in execution" - - 591
See SHERIFF.

—— Receiving—Property stolen by wife from husband—Larceny - - 601
See CRIMINAL LAW. 3.

—— Sale of food and drugs.
See Cases under ADULTERATION.

—— Street—"New street"—Lapse of time since road became—Paving expenses — Liability of frontagers - - 188
See LONDON. 1.

JUSTICES—*continued.*

—— Streets — Paving expenses — Alteration of width of carriageway and footway — Power of urban authority - - 198
See LOCAL GOVERNMENT. 3.

—— Turnpike Act — Tolls — Exemption — Carriage employed in military service of Crown - - - - 444
See HIGHWAY.

—— Unsound food, Destruction of — Duty of magistrate - - - - 448
See LONDON. 2.

—— Vagrancy—Wilful refusal or neglect of person to maintain himself — Incapacity resulting from drunkenness - 695
See POOR LAW. 2.

LANDLORD AND TENANT—*Covenant for Quiet Enjoyment—Interruption — Breach of Covenant against Assignment—Subsequent Assignment of Reversion—Re-entry by Assignees of Reversion—Consent Judgment.*

The defendant was the lessee of a shop, the lease containing a covenant by him not to assign or underlet the premises. There was a condition for re-entry upon breach of any of the covenants in the lease. The defendant let the premises to the plaintiff for the remainder of the term, this lease containing a covenant by the defendant for quiet enjoyment of the premises by the plaintiff without any interruption by the defendant or any person lawfully claiming through him. Subsequently the original lessor assigned the reversion, and the assignees of the reversion brought an action against the defendant to recover possession of the premises as upon the breach of covenant against assignment. The defendant gave the plaintiff notice of the action, telling him that there was no defence, and signed a consent to judgment for possession, under which the plaintiff was evicted:—

Held, that, as the defendant had a good defence to the action, the breach of covenant having occurred before the assignment of the reversion, the act of the defendant in consenting to judgment for possession was the cause of the interruption of the plaintiff's enjoyment, and was therefore a breach of the covenant for quiet enjoyment. COHEN *v.* TANNAR - C. A. 609

2. —— *Forfeiture—Covenant not to Assign—Equitable Assignment—Declaration of Trust—Condition against Assignment for Benefit of Creditors — "Disposing of the Land leased" —Notice before Action—Service on "Lessee"—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 4—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 6 (*i.*); *s.* 67, *sub-s.* 2.

By a lease the lessee covenanted not to assign or underlet the demised premises without the consent of the lessor, and there was a proviso for re-entry on breach of any of the covenants, or if the lessee should (inter alia) execute an assignment for the benefit of his creditors. The lessee executed an assignment of all his real and personal property, except that of a leasehold tenure, to a trustee for the benefit of his creditors, and he declared that he would stand possessed of all his leasehold property upon trust for the trustee and to assign and dispose of the same in such manner as the trustee should direct for the purposes of the deed. The trustee entered into possession of the demised premises, but no legal assignment of them was executed. The lessor served upon the trustee a notice alleging as ground of forfeiture the execution by the lessee of the assignment. In an action against the lessee to recover possession of the premises:—

Held, that, as there had been no legal assignment of the premises, there had been no breach of the covenant against assignment:—

Held, also, that the condition against assignment for the benefit of creditors was not a condition against disposing of the land leased within the meaning of s. 14, sub-s. 6 (i.), of the Conveyancing and Law of Property Act, 1881, and therefore service of notice on the lessee under s. 14, sub-s. 1, was necessary before the lessor could enforce his right of re-entry; and that service of the notice on the trustee under the deed was not a sufficient compliance with the provisions of s. 14, sub-s. 1, and s. 67, sub-s. 2, of the Act.

A condition against the disposing of the land leased within the meaning of s. 14, sub-s. 6 (i.), of the Conveyancing and Law of Property Act, 1881, means a condition which on its face is against the disposing of the land leased. GENTLE *v.* FAULKNER - - - - C. A. 267

3. — *Mortgagor in Possession—Ejectment for Breach of Covenant — Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 5.

The Judicature Act, 1873, s. 25, sub-s. 5, does not give to a mortgagor in possession of land, subject to a lease, the right to re-enter for breach of the covenants of the lease. MATTHEWS *v.* USHER C. A. 535

—— Ground game.
See Cases under GAME.

LANDS CLAUSES ACTS—*Compensation—Lands injuriously affected—Mine—Lease of Colliery—Right of Lessee to sink Shaft in Land of Lessor not included in Demise—Reasonable Approval of Lessor—Railway Company—Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.

A lease of a colliery with its buildings, pits, shafts, and works, together with the veins of coal under a specified acreage of adjoining land the surface of which was not included in the demise, contained a proviso that the lessee might at any time during the term sink a pit or pits in any part of the lands the surface of which was not demised, but so that the position of the pits should be subject to the reasonable approval of the lessor. The lessor having contracted to sell a portion of the surface to a railway company, the company gave to the lessee a notice to treat in respect of his interest in the surface of the land taken by them, and the lessee gave to the lessor notice under the lease of his intention to sink a pit in the land so taken:—

Held, that the right to sink a pit in the land the surface of which was not included in the demise, although subject to the reasonable

LANDLORD AND TENANT—*continued.*
approval of the lessor, gave the lessee an interest in land which was the subject of compensation under s. 68 of the Lands Clauses Act, 1845. *In re* MASTERS AND GREAT WESTERN RAILWAY COMPANY - - - - - **Div. Ct. 677**

LARCENY—Receiving—Property stolen by wife from husband - - - **601**
See CRIMINAL LAW. 3.

LEASE—By mortgagor in possession—Foreclosure by mortgagee—Lease binding on mortgagee - - - - **653**
See MORTGAGE.

LIBEL—Publication—Circulating library—Book circulated in ignorance of libel contained in it—Negligence - - **170**
See DEFAMATION.

LIBRARY — Libel — Publication — Book — Circulating library - - **170**
See DEFAMATION.

LICENCE.
See Cases under LICENSING ACTS.

LICENSING ACTS—*Appeal against Refusal to Renew Licence—Costs of Justices—Indemnity Costs, Right to—Mandamus—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29.

Where licensing justices, who had been served with notice of appeal against their refusal to renew a licence, had appeared at quarter sessions and acted as respondents to the appeal:—

Held, that s. 29 of the Alehouse Act, 1828, made it imperative, upon the dismissal of the appeal, for the court of quarter sessions to entertain an application by the licensing justices for an order upon the appellants to pay them such sum by way of costs as should in the opinion of the court of quarter sessions be sufficient to indemnify them from all costs and charges to which they might have been put in consequence of their having had notice of the appeal served upon them.

Reg. v. *London Justices*, [1895] 1 Q. B. 616, not followed. THE QUEEN *v.* WORCESTERSHIRE JUSTICES - - - - **C. A. 576**

2. —— *Appeal to Quarter Sessions—Onus of Proof—Licence—Renewal—Refusal to Renew without Evidence—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 27.

On an appeal to quarter sessions against the refusal of licensing justices to renew a licence, the quarter sessions are not entitled to refuse to renew the licence without evidence of any ground of objection to its renewal:—

So *held*, reversing the decision of a Divisional Court, [1900] 2 Q. B. 5. EVANS *v.* CONWAY JUSTICES - - - - **C. A. 224**

3. —— *Costs—Justices—Quarter Sessions—Jurisdiction—Costs of Appeal—Costs of Licensing Justices on successful Appeal—Order to pay Costs incurred by Clerk to Justices—Taxation—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29.

By s. 29 of the Alehouse Act, 1828, power is given to a court of quarter sessions, where a judgment of licensing justices is reversed upon appeal, to order "that the treasurer of the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment shall pay to such justice or to whomsoever he shall appoint such sum as shall in the opinion of such Court be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been put" in consequence of his having had served upon him notice of the intention of the party to appeal.

An order of quarter sessions, made upon the allowance of an appeal from the licensing justices of a borough, and directing the borough treasurer to pay to the clerk of the borough justices a certain sum of money for the reasonable costs, charges, and expenses to which he has been put in supporting the order of the licensing justices is bad, it not being an order for payment of a sum which in the opinion of the Court will "indemnify the justices" from the costs to which they have been put.

Where an order is made under the above section, the amount of the costs, if not ascertained by the Court itself, should be ascertained by the taxation of the clerk of the peace, and his taxation should be adopted by the Court, during the currency of the sessions; the costs can only be taxed out of sessions by consent. THE QUEEN *v.* WINDER - - - - **Div. Ct. 666**

4. —— *Licence—Renewal—Licensed Premises not used for Sale of Beer for Long Period.*

A beerhouse licence had been continuously renewed in respect of premises which had been licensed prior to May, 1869; but the licence had not been exercised and no beer had been sold on the premises for a long period:—

Held, that this fact gave the justices no jurisdiction to refuse to renew the licence to a new tenant who intended to carry on the premises as bonâ fide licensed premises, but that they were still limited to the four grounds of objection specified in s. 8 of the Wine and Beerhouse Act, 1869. MACKRELL *v.* BRENTFORD JUSTICES **Div. Ct. 387**

5. —— *Licence—Renewal—Objection—Request for Adjournment—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42.

At the general annual licensing meeting for a borough, a request was made by the head constable that the renewal of the licence of a beerhouse which had been licensed prior to May, 1869, should be withheld until the adjourned meeting, and the justices accordingly adjourned the granting of the renewal:—

Held, that this request amounted to the making of an objection within the meaning of the proviso to s. 42, sub-s. 2, of the Licensing Act, 1872, and gave the justices jurisdiction to refuse the renewal at the adjourned meeting on one of the four grounds specified in s. 8 of 32 & 33 Vict. c. 27. HAWKINS *v.* BRIDGWATER JUSTICES - - - - **Div. Ct. 382**

LIEN — Solicitors' costs — Charging order — "Property recovered or preserved" in bankruptcy proceedings—Jurisdiction
See BANKRUPTCY. 3. **489**

LIFE INSURANCE—Premiums—Voluntary payment by settlor—Bankruptcy of settlor—Policy moneys—Proportion not represented by each premium - - 710
See BANKRUPTCY. 16.

LIGHT — *Prescription — Use of Premises for Purposes requiring special Quantity of Light—Measured Right.*

The plaintiffs' windows had for twenty years received an extraordinary amount of light; but although during the whole of that period the premises were suitable for the purposes of a business requiring an extraordinary amount of light, they had in fact been used for those purposes during only a portion of the period. The defendant, by the erection of a building, materially diminished the amount of light passing through the windows, but left sufficient for all ordinary purposes:—

Held, that the plaintiff had no cause of action.

Quære, whether it would have made any difference if the premises had been used during the whole of the statutory period for purposes requiring an extraordinary amount of light. WARREN *v.* BROWN - - Wright J. 722

LIMITATION OF ACTION—Public authorities protection — Fatal Accidents Act — Neglect in execution of Act of Parliament - - - - 454
See PUBLIC AUTHORITIES PROTECTION.

LIQUIDATOR—Appointment of, after winding-up order—Official receiver - 634
See COMPANY. 3.

LOCAL GOVERNMENT—*Sanitary Convenience—Stable—Workplace—Persons in Attendance—Cabmen — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 38.

Sect. 38 of the Public Health (London) Act, 1891, enacts that every factory, workshop, or workplace shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, regard being had to the number of persons employed in or in attendance at such building:—

Held, that a stable-yard and stables at which a large number of cabmen were daily in attendance for the purpose of hiring cabs was a workplace within the meaning of the section, and must, therefore, be provided with sufficient and suitable sanitary conveniences for the cabmen. BENNETT *v.* HARDING - - Div. Ct. 397

2. —— *Sewers—Duty of Local Authority to cleanse Sewers—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 19, 299.

Sect. 299 of the Public Health Act, 1875, in providing for complaint to the Local Government Board where a local authority has made default in the maintenance of existing sewers, does not apply to s. 19 of the Act, which imposes on local authorities the duty to cleanse sewers vested in them, and consequently does not affect the right of action of a person who has sustained damage through the negligence of a local authority in not cleansing a sewer vested in them. BARON *v.* PORTSLADE URBAN DISTRICT COUNCIL C. A. 583

3. —— *Streets—Paving Expenses—Alteration of Width of Carriageway and Footway—Power of Urban Authority — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

An urban authority, when paving and making good a street, not being a highway repairable by the inhabitants at large, under s. 150 of the Public Health Act, 1875, has no power to alter the respective widths of the carriageway and footway of the street. ROBERTSON *v.* BRISTOL CORPORATION - - - - C. A. 198

—— Costs of legal proceedings—"Full compensation"—Extra costs—Public health
See PRACTICE. 2. 423

LOCOMOTIVE—Extraordinary traffic—Person by or in consequence of whose order such traffic has been conducted - 751
See HIGHWAY. 1.

LONDON—*Street*—"*New Street*"—*Paving Expenses—Liability of Frontagers—Lapse of Time since Road became New Street—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105.

In 1883 a highway, the greater part of which was then paved, became a "new street" within the meaning of s. 105 of the Metropolis Management Act, 1855, which enables a metropolitan vestry or district board to pave any "new street" not paved to their satisfaction, and to charge the expense on the owners of the houses forming the street. From 1883 to 1899 the district board, and the vestry who succeeded them, repaired the footways and carriageway of the street as surveyors of highways. In 1899 the vestry resolved to exercise their powers under s. 105, and required the owners to pay the apportioned expenses of paving the street:—

Held, distinguishing *Bonella* v. *Twickenham Local Board*, (1887) 20 Q. B. D. 63, that, as neither the board nor the vestry had exercised their powers under s. 105 before 1899, the vestry were then entitled to exercise them, notwithstanding the time which had elapsed since the road became a new street.

A road may become a "new street" within s. 105 of the Metropolis Management Act, 1855, although all the land on one side of it is building land upon which no building has been erected. SIMMONDS BROTHERS, LIMITED *v.* FULHAM VESTRY Div. Ct. 188

2. —— *Unsound Food, Destruction of—Duty of Magistrate—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 47.

Where proceedings are taken before a magistrate under s. 47 of the Public Health (London) Act, 1891, for the condemnation as diseased, or unsound, or unwholesome, or unfit for the food of man, of an article seized by a medical officer of health or sanitary inspector under the provisions of that section, the magistrate has no jurisdiction to inquire whether the article was intended for the food of man, but is bound to order its destruction upon being satisfied that it is in fact diseased, or unsound, or unwholesome, or unfit for the food of man. THOMAS *v.* VAN OS - Div. Ct. 448

—— City of London—Statute—Implied repeal — Exemption from taxes and assessments - - - - 581
See STATUTE.

LONDON—*continued.*

—— Sanitary convenience—Stable—Workplace —Persons in attendance—Cabmen 397
See LOCAL GOVERNMENT. 1.

—— Sheriff—Goods "taken in execution"—Duty of sheriff to pay rates - 591
See SHERIFF.

—— Water rate, Arrears of—Trustee in bankruptcy—Payment of arrears under protest—"Incoming tenant" - - 32
See BANKRUPTCY. 11.

LUNACY—*Pauper Lunatic—Reception Order—Jurisdiction of Justice—Workhouse situate outside Union—Poor Law Amendment Act*, 1844 (7 & 8 *Vict. c.* 101), *s.* 56—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 14, 24.

By s. 14 of the Lunacy Act, 1890, provision is made for bringing paupers who are lunatics and proper to be sent to an asylum before "a justice having jurisdiction in the place where the pauper resides." A pauper who was chargeable to a union became a lunatic while residing in the workhouse infirmary, which was situate outside the boundaries of the union:—

Held, that a justice having jurisdiction in the union to which the workhouse belonged had power to deal with the case, since s. 56 of the Poor Law Amendment Act, 1844, applied, and the workhouse must, therefore, be considered as situated in the parish to which the lunatic was chargeable. THE QUEEN *v.* BELL - **Div. Ct.** 391

MAINTENANCE—Vagrancy—Wilful refusal or neglect of person to maintain himself—Incapacity resulting from drunkenness
See POOR LAW. 2. 695

MANAGER—Remuneration of special manager—Just allowances—Officers of the Court, Protection of - - - 429
See BANKRUPTCY. 6.

MANDAMUS—Costs of justices—Indemnity costs, Right to—Appeal against refusal to renew licence - - - - 576
See LICENSING ACTS. 1

MARGARINE—Certificate of analyst—Evidence —Sale of Food and Drugs Act - 413
See ADULTERATION. 2.

MARINE INSURANCE.
See Cases under INSURANCE, MARINE.

MARRIED WOMAN - - - - 784
See HUSBAND AND WIFE.

MARRIED WOMEN'S PROPERTY ACT—Receiving—Property stolen by wife from husband—Larceny - - - 601
See CRIMINAL LAW. 3.

MASTER AND SERVANT.
See Cases under EMPLOYER AND WORKMAN.

MEDICAL PRACTITIONER—Right of employer to examination of workman by—Workmen's Compensation Act - - 91
See EMPLOYER AND WORKMAN. 11.

MERCHANDISE MARKS—*False Trade Description—"Applied" to Goods—Representation implied from Conduct—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28).

The appellant went into the respondents' shop and asked for two half-pounds of tea. The respondents' salesman handed him two packets of tea, for which he paid. The packets respectively contained less than a half-a-pound weight of tea:—

Held, that the mere handing of the packets to the appellant in response to his demand did not constitute an "application" to the goods of a false trade description of their weight within the meaning of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887. LANGLEY *v.* BOMBAY TEA COMPANY - - - - **Div. Ct.** 460

—— Offence of selling goods to which false trade-mark is applied — Acting innocently - - - - 522
See TRADE-MARK.

MERCHANT SHIPPING—Transfer of ship—Registration—Fees - - 28
See SHIPPING. 5.

METROPOLIS.
See LONDON.

MILITARY SERVICE—Carriage employed in, of Crown—Turnpike Acts—Tolls—Exemption - - - - - 444
See HIGHWAY. 2.

MILK—Sale—Written warranty—"Milk to be pure new milk" - - - 117
See ADULTERATION. 4.

MINE—Compensation—Lease of colliery—Right of lessee to sink shaft in land of lessor not included in demise - - 677
See LANDS CLAUSES ACTS.

MORTGAGE—*Lease by Mortgagor in Possession—Occupation Lease—Inclusion of Incorporeal Hereditament—Mansion-house, Furniture, and Sporting Rights—Foreclosure by Mortgagee—Lease binding on Mortgagee—Conveyancing Act* 1881, (44 & 45 *Vict. c.* 41), *s.* 18.

A mortgagor of land while in possession leased for fourteen years the mortgaged house, together with the furniture in it and land adjoining it, and the sporting rights over the remainder of the mortgaged land, which had been let, before the mortgage was created, to agricultural tenants, with a reservation of sporting rights. The mortgagee having foreclosed:—

Held, that the lease was valid as against the mortgagee under s. 18 of the Conveyancing Act, 1881.

Judgment of Bigham J., [1900] 1 Q. B. 346, affirmed. BROWN *v.* PETO - - **C. A.** 653

—— Mortgagor in possession — Ejectment for breach of covenant - - - 535
See LANDLORD AND TENANT. 3.

NAME—Bill of sale—Validity—Grantor known only under assumed name—Bill registered under true name - - 483
See BILL OF SALE.

NEGLIGENCE—General average—Charterparty —Bill of lading—Negligence clause
See SHIPPING. 3. 540

NEGLIGENCE—*continued.*

—— Libel—Publication—Circulating library—Book circulated in ignorance of libel contained in it - - - 170
See DEFAMATION.

—— Limitation of action—Fatal Accidents Act—Neglect in execution of Act of Parliament - - - - - 454
See PUBLIC AUTHORITIES PROTECTION.

—— Servant—Omnibus driven by conductor—Onus of proving authority - 530
See EMPLOYER AND WORKMAN. 12.

OFFICIAL RECEIVER—Appointment of liquidator after winding-up order - 634
See COMPANY. 3.

—— Special manager, Remuneration of—Just allowances—Officers of the Court, Protection of - - - - 429
See BANKRUPTCY. 6.

OMNIBUS—Driven by conductor—Onus of proving authority—Negligence of servant - - - - - 530
See EMPLOYER AND WORKMAN. 12.

ONUS PROBANDI—Omnibus driven by conductor—Onus of proving authority—Negligence of servant - - - 530
See EMPLOYER AND WORKMAN. 12.

PARTNERSHIP — Dissolution — Partnership debts—Writ against firm after dissolution—Judgment against late firm—Liability of partners - - - - 698
See BANKRUPTCY. 2.

PARTY WALL—*Adjoining Owners—Implied Contract to Pay Half Cost of Party Wall.*

A building society, who were the mortgagees of a building estate, joined with the mortgagor in selling a site on the estate to a purchaser; the conveyance contained a covenant by the purchaser to perform the building and other conditions in the schedule, one of which was that the purchaser first building a party wall should be repaid half the value by the purchaser of the adjoining site. The purchaser, having built a house on the site, mortgaged it to the building society, who subsequently under their power of sale sold it to the plaintiff. At a later date the building society, in exercise of their power of sale under the original mortgage of the building estate, sold the residue of the estate to a company, who in their turn sold to the defendants a site adjoining the plaintiff's house, the agreement of sale containing a similar (though not verbally identical) condition as to party walls to that above mentioned. The defendants built a house on their site, making use for that purpose of the plaintiff's party wall, half of which (as provided by the building conditions) was built on the plaintiff's, and half on the defendant's, land:—

Held, that the circumstances raised an implied contract on the part of the defendants to pay half the cost of the party wall to the plaintiff as the owner of the adjoining house, notwithstanding that the wall had in fact been built by the plaintiff's predecessor in title. IRVING *v.* TURNBULL
Div. Ct. 129

PAUPER.
See POOR LAW.

PAVING—"New street"—Lapse of time since road became—Liability of frontagers
See LONDON. 1. 188

—— Streets—Alteration of width of carriageway and footway - - - - 198
See LOCAL GOVERNMENT. 3.

PAYMENT IN COURT—For leave to defend—Bankruptcy of defendant before trial—Secured creditor - - - 211
See BANKRUPTCY. 8.

PETITION—Bankruptcy practice
See Cases under BANKRUPTCY.

PLEADING—Counter-claim in reply - 181
See PRACTICE.

POLICY—Life—Premiums—Voluntary settlement—Bankruptcy of settlor—Policy moneys - - - - 710
See BANKRUPTCY. 16.

—— Marine insurance.
See Cases under INSURANCE, MARINE.

POOR LAW—*Removal of Pauper—Irremovability—Break of Residence—Intention of Pauper to Reside Permanently in Another Union.*

A pauper whose original settlement was in the C. Union had by residence become irremovable in the E. Union, and was sent to the E. Workhouse. She desired to be sent to the C. Workhouse, in which her son was, and she therefore obtained her discharge from the E. Workhouse and went to reside for a week with a relative in another union in order to break her status of irremovability in the E. Union. She then returned to the E. Workhouse for the purpose of being sent to the C. Union:—

Held, that an order for her removal from the E. Union to the C. Union was rightly made. CAMBRIDGE UNION *v.* EDMONTON UNION
Div. Ct. 111

2. —— *Wilful Refusal or Neglect of Person to maintain himself — Incapacity resulting from Drunkenness—Vagrancy Act* 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

Where a person at the time of his becoming chargeable to a union is owing to illness unable to maintain himself, the fact that that illness was the result of drunkenness does not cause his inability to amount to a wilful refusal or neglect to maintain himself within the meaning of s. 3 of the Vagrancy Act, 1824. ST. SAVIOUR'S UNION *v.* BURBRIDGE - - Div. Ct. 695

—— Lunatic—Reception order—Jurisdiction of justices — Workhouse situate outside union - - - - 391
See LUNACY.

—— Superannuation allowance, contribution for income tax—Salary—Deductions 204
See REVENUE. 5.

PRACTICE—*Costs—Action against Public Authority—Discretion to Deprive Successful Defendants of Costs—Order* LXV., *r.* 1—"*Good Cause*"—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).

The Public Authorities Protection Act, 1893, s. 1 (*b*), which provides that, wherever in an

PRACTICE—*continued.*

action within the Act a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client, does not take away the discretion given to the judge at the trial by Order LXV., r. 1, to deprive the successful defendant of costs for good cause :—

So *held*, affirming the judgment of Lord Russell of Killowen C.J.

What constitutes "good cause" within Order LXV., r. 1, discussed. BOSTOCK *v.* RAMSEY URBAN DISTRICT COUNCIL - - C. A. 616

2. —— *Costs—Local Government—Damage by reason of Exercise of Powers of Act—Costs of Legal Proceedings—"Full Compensation"—Extra Costs—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 308.

"Full compensation" for damage sustained by reason of the exercise of any of the powers of the Act under s. 308 of the Public Health Act, 1875, does not include extra costs of legal proceedings which have been incurred, over and above the taxed party and party costs, by a person against whom the local authority has unsuccessfully proceeded under the Act.

Proceedings having been taken under ss. 94–96 of the Public Health Act, 1875, by the respondents, a local authority, against the appellant in respect of a nuisance, an order to abate the nuisance was made against the appellant by the justices. He appealed against the order to quarter sessions, who dismissed the appeal, subject to a case. On the hearing of the case a Divisional Court ordered that the order of quarter sessions should be quashed with costs, and that the respondents should pay to the appellant his costs of the appeal to the High Court to be taxed. The costs of the two appeals were taxed and paid to the appellant. In prosecuting the appeals the appellant reasonably incurred costs to a greater amount than the taxed costs which he received, and he claimed from the respondents the difference between the taxed costs and the amount so expended by him, as compensation under s. 308 of the Public Health Act, 1875 :—

Held (affirming the decision of a Divisional Court, [1900] 2 Q. B. 104), that he was not entitled to recover the amount so claimed by him. BARNETT *v.* ECCLES CORPORATION - C. A. 423

3. —— *Discovery—Privilege—Communications between Solicitor and Client—Evasion of Statute—Production of Documents.*

The privilege from production of confidential communications between a solicitor in his professional capacity and his client does not extend to communications which came into existence for the purpose of the client's procuring advice as to the mode in which he might evade the provisions of a Colonial statute imposing a duty in respect of property. THE QUEEN *v.* BULLIVANT C. A. 163

4. —— *Pleading — Counter-claim in reply—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-ss.* 3, 7 — *Order XIX., r.* 3; *Order XXI., rr.* 10–17.

In an action for the price of goods supplied, the defendants counter-claimed for damages for breach by the plaintiffs of a contract. The plaintiffs in their reply denied that the contract was binding on them, and further alleged that, if it was binding, the defendants had committed breaches of it which caused them loss, and they counter-claimed to set off the loss so sustained against the defendants' counter-claim. Upon an application to strike out the counter-claim in the reply :—

Held, that as the plaintiffs did not rely upon the counter-claim in the reply as an independent claim, but merely as a protection against the defendants' counter-claim, the counter-claim was properly raised in the reply and ought not to be struck out.

Toke v. *Andrews*, (1882) 8 Q. B. D. 428, approved. RENTON GIBBS & Co. *v.* NEVILLE & Co. C. A. 181

5. —— *Sequestration — Payment of Costs—Service—Rules of Supreme Court, Order XLI., r.* 5; *Order XLIII., rr.* 6, 7.

In the case of a writ of sequestration issued by leave of a judge to enforce payment of costs under Order XLIII., r. 7, the provisions of Order XLI., r. 5, and Order XLIII., r. 6, are inapplicable. Therefore in such a case it is not necessary that the order for payment of costs should limit a time for payment or should bear the indorsement mentioned in Order XLI., r. 5, nor is personal service of it essential.

In re Lumley, Ex parte Cathcart, [1894] 2 Ch. 271, followed. *In re* DEAKIN. *Ex parte* CATHCART C. A. 478

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PRODUCTION OF DOCUMENTS — Privilege — Communications between solicitor and client—Evasion of statute - 163
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PROHIBITION—*Inferior Court—Jurisdiction* — *Salford Hundred Court of Record Act*, 1868 (31 & 32 *Vict. c. cxxx.*), *ss.* 6, 7.

"The cause of action" in the Salford Hundred Court of Record Act, 1868, s. 6, means the whole cause of action, and not merely the act or default which gives the plaintiff his cause of complaint.

Sect. 7 of the Salford Hundred Court of Record Act, 1868, enacts that "No defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes":—

Held (by the Court of Appeal, reversing the decision of a Divisional Court), that, the effect of the section being to give jurisdiction to the Salford Hundred Court in cases where the want of jurisdiction is not pleaded, a defendant, against whom judgment had been recovered in that court in default of appearance, and who had consequently not pleaded to the jurisdiction, was not entitled to a writ of prohibition on the ground of want of jurisdiction. PAYNE *v.* HOGG C. A. 43

PROMISSORY NOTE—Fraud—Note returned to maker—Liability on maker of note—Overdue note—Holder "in his own right" - - - - 72
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PUBLIC AUTHORITIES PROTECTION—*Limitation of Action—Neglect in Execution of Act of Parliament—Fatal Accidents Act*, 1846 (9 & 10 *Vict. c.* 93), *ss.* 1, 3—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

By s. 3 of the Fatal Accidents Act, 1846, an action for the benefit of the wife, husband, parent, or child of a person whose death has been caused by the wrongful act, neglect, or default of another must be commenced within twelve calendar months of the death of the deceased.

By s. 1 of the Public Authorities Protection Act, 1893, an action against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act, must be commenced within six months next after the act, neglect, or default complained of, or, in case of continuing injury or damage, within six months next after the ceasing thereof.

An action under the Fatal Accidents Act, 1846, was brought against the defendants, a statutory body formed to provide, maintain, and manage a hospital, to recover damages for the death of a patient in the hospital caused by the negligent act of a nurse in the defendants' employment; the writ was issued more than six months, but less than twelve months, after the death of the deceased:—

Held, that the plaintiffs' cause of action arose upon the death of the deceased, and that, the action not having been brought within six months after his death, the defendants were entitled to the protection of the Public Authorities Protection Act, 1893, and the action was not maintainable. MARKEY *v.* TOLWORTH JOINT ISOLATION HOSPITAL DISTRICT BOARD - Div. Ct. 454

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—— Costs of legal proceedings—"Full compensation"—Extra costs—Local Government - - - - - 423
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—— Libel—Book—Circulating library—Negligence - - - - 170
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QUARTER SESSIONS—Appeal to—Licence—Onus of proof—Refusal to renew without evidence - - - 224
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—— Compensation—Lease of colliery—Right of lessee to sink shaft in land of lessor not included in demise - - 677
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—— Demurrage—Discharge into railway wagons—Deficiency of wagons—Liability of charterer - - - - 638
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—— Stamp duty—Increase of nominal capital *See* REVENUE. 6. 353

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—— Official—Appointment of liquidator after winding-up order - - - 634 *See* COMPANY. 3.

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RESTRAINT UPON ANTICIPATION — Wife's contracts during coverture—Judgment after cessation of coverture—Separate property - - - - 784 *See* HUSBAND AND WIFE.

REVENUE—*Collection of Taxes—Income Tax and Inhabited House Duty—Distress—Powers of Collectors — Expiration of Collector's Year — Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19).

The collectors appointed in each year under the Taxes Management Act, 1880, to collect the duties payable for the year have authority to distrain from those duties if unpaid, although the year has expired; at any rate until they have accounted for the duties given them in charge to collect under Part VII. of the Act. ELLIOTT *v.* YATES - - - - - C. A. 370

2. —— *Estate Duty—Succession Duty—Disposition by Foreigner domiciled Abroad—Property situate Abroad—Disposition to English Company on Trusts enforceable by English Law—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 7, 8, 16.

In 1892 a foreigner domiciled in Austria gave, by deed, to an English company, registered under the Companies Acts and having its registered office in London, certain stocks, shares, and securities to a large amount upon the terms and conditions that the company would permit the donor to receive the income thereof during his life, and after his death would apply the same stocks, shares, and securities, and any investments substituted for them under the powers of the deed, for the benefit of Russian Jews generally, and principally for the promotion of the emigration of Russian Jews from Europe, and of their settlement in various countries outside Europe. The company had been formed to carry out the same objects, and shortly after the execution of the deed the property so given was handed over to the company by the donor. The whole of the company's business was, under the articles of association, transacted by a council which sat at the principal office of the company in Paris. The ordinary and extraordinary general meetings of the company were held at their registered office in London, but formal business only was transacted there. In 1896 the donor, being still domiciled in Austria, died. At that time the principal part of the securities subject to the deed were foreign securities situate abroad, and the documents of title thereto were abroad, a small proportion only of the property subject to the deed being in England:—

Held, that the company was an English company, and recourse must be had to English law in order to enforce the trusts of the deed, and, therefore, that estate and succession duty were payable, under the Finance Act, 1894, and the Succession Duty Act, 1853, upon the principal value of all the property which was subject to those trusts at the donor's death. ATTORNEY-GENERAL *v.* JEWISH COLONIZATION ASSOCIATION Div. Ct. 556

3. —— *House Duty—Annual Value—Full and Just Yearly Rent—House Tax Act*, 1851 (14 & 15 *Vict. c.* 36); 48 *Geo.* 3, *c.* 55, *Sched. B.*

The commissioners for inhabited house duty, when assessing for the purposes of that duty a house situate outside the metropolis, are not bound by the assessment appearing in the poor-rate book, but ought to receive independent evidence to enable them to arrive at the annual value.

Where a house is let to a brewer at one rent and sub-let by him to a licensed victualler at a lower rent upon the terms of the latter buying all his beer from him, the full and just yearly rent

REVENUE—*continued.*

for the purposes of inhabited house duty is not the lower rent paid by the sub-tenant to the brewer, nor is it necessarily the higher rent paid by the brewer to his lessor, but the commissioners ought to receive evidence of the sum which the house is worth let by the year as a free house. WALKER *v.* BRISLEY. GRINTER *v.* FLEMING **Div. Ct. 735**

4. —— *Income Tax—Assignment for Benefit of Creditors—Profits made by Trustee in carrying on Part of Insolvent Debtor's Business—Income Tax Acts, Sched. D.*

A firm of worsted spinners, having a lease for years of their business premises, generated steam power on part of those premises for the purpose of driving their spinning machines, and sub-let another part, and supplied their surplus steam power to the sub-lessees, and to others, at agreed prices. The firm subsequently became insolvent, and executed a deed of assignment of all their real and personal estate, other than leasehold property, to a trustee for the benefit of creditors. The trustee thereupon occupied the part of the premises which had been retained by the firm, and, under the powers of the deed of assignment, continued to supply the sub-lessees and the others with steam power upon the same terms for the purpose of realizing the firm's assets to the best advantage. He did not otherwise carry on the business of the firm. On the expiration of the sub-lease the firm, by the direction of the trustee, granted to the same underlessee a further under-lease of the same part of the premises, and the trustee continued to supply the steam power on the same terms as before. The sums received by the trustee for the steam power supplied exceeded the cost of supplying it, though the whole business carried on by the firm had been carried on at a loss, and the assets realized by the trustee had only produced a dividend of 8*s.* in the pound:—

Held, that income tax under Sched. D. was payable by the trustee in respect of the profits made by him in supplying the steam power. ARMITAGE *v.* MOORE - - - **Div. Ct. 363**

5. —— *Income Tax—Salary—Deductions—Contribution for Superannuation Allowance—Sum payable or chargeable by virtue of Act of Parliament—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 146—*Poor Law Officers' Superannuation Act*, 1896 (59 & 60 *Vict. c.* 50), *s.* 12.

The appellant, who was clerk to the guardians of a union, and to the assessment and school attendance committees, was assessed in respect of his salary, under Sched. E., on a net amount of 289*l.* He contributed annually under s. 12 of the Poor Law Officers' Superannuation Act, 1896, for the purposes of that Act, a sum of 15*l.* 10*s.*, which was deducted from his salary under that section. He claimed to deduct this sum from the amount on which he was assessed, by virtue of the Income Tax Act, 1842, s. 146, Sched. E, First Rule, by which duty is payable on salaries, &c., "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament."

On a case stated:—

Held, that the amount contributed by the appellant, under the Poor Law Officers' Superannuation Act, came within the words "duties or other sums payable or chargeable by virtue of any Act of Parliament," in the Income Tax Act, 1842, s. 146, and therefore he was entitled to the deduction claimed. BEAUMONT *v.* BOWERS **Div. Ct. 204**

6. —— *Stamp Duty — Railway Company—Increase of Nominal Capital—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

A special Act authorized the Midland Railway Company to rearrange and consolidate the several classes and denominations of the shares and stocks in the capital of the company, and of their loans and debenture stocks. Under the authority of that Act the following changes (inter alia) were effected by the company: 3,899,121*l.* 4 per cent. consolidated perpetual rent-charge stock was consolidated so as to amount to 6,238,594*l.* guaranteed stock bearing interest at the rate of 2*l.* 10*s.* per cent. per annum. 29,048,191*l.* 4 per cent. perpetual preference stock was extinguished, and in lieu thereof 46,477,106*l.* 2½ per cent. perpetual preference stock was created. Ordinary stock to the amount of 35,000,000*l.* was extinguished, and in lieu thereof there was created 35,000,000*l.* preferred converted ordinary stock, entitled to a dividend at the rate of 2*l.* 10*s.* per cent. per annum, and 35,000,000*l.* deferred converted ordinary stock:—

Held, that the increase authorized by the Act of the nominal amount of the share capital of the company was an "increase of the amount of nominal share capital" within the meaning of s. 113 of the Stamp Act, 1891, so that the stamp duty imposed by that section was payable in respect of it. ATTORNEY-GENERAL *v.* MIDLAND RAILWAY COMPANY - - **Div. Ct. 353**

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SECURED CREDITOR — Payment in court for leave to defend—Bankruptcy of defendant before trial - - - 211
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SEPARATE PROPERTY—Restraint upon anticipation—Wife's contracts during coverture — Judgment after cessation of coverture - - - - 784
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SETTLEMENT—Voluntary settlement—Discretionary trust to pay future debts—Intent to defeat and delay future creditors
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—— Voluntary settlement—Father and son—Purchaser for value—"Settlement of property" - - - - 790
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—— Voluntary settlement—Life policy—Premiums—Voluntary payments by settlor—Bankruptcy of settlor—Policy moneys
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SEWERS — Cleansing sewers — Duty of local authority - - - - 588
See LOCAL GOVERNMENT. 2.

SHARES—Calls on forfeited shares—Liquidation—Past member of company - 376
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SHERIFF—*Rates, Duty of Sheriff to pay—Seizure of Goods of Person liable to pay Rates—Goods "taken in Execution"*—35 *Geo.* 3, *c.* 73 (*Local*)—*Metropolis Management Act*, 1855 (18 *& 19 Vict. c.* 120), *ss.* 161, 250.

By a local Act, where in a certain metropolitan parish the goods of any person liable to pay a rate by virtue of the Act shall have been "taken in execution" by a sheriff before the rate shall have been paid, the sheriff upon demand by the rate-collector is "directed and required in the first place" to pay the rate to the collector; and by the Metropolis Management Act, 1855, the vestry of the parish are to have, for the purpose of levying the rates therein mentioned, the same powers, remedies, and privileges as for levying money for the relief of the poor.

A sheriff seized under a fi. fa. the goods of a judgment debtor who was liable to pay to the vestry, as the rating authority of the parish, a certain rate made up of a poor-rate by virtue of the local Act and a general rate under the Metropolis Management Act, 1855. A demand was made on the sheriff by the rate-collector for the amount of the rate; but the sheriff, having subsequently received from the debtor the amount of the judgment debt, withdrew from possession without having paid the rate:—

Held, that the goods had been taken in execution within the meaning of the local Act, and that the sheriff was liable to the vestry for the amount of the rate.

Judgment of Bigham J., [1900] 1 Q. B. 111, affirmed. MARYLEBONE VESTRY *v.* SHERIFF OF LONDON - - - - **C. A. 591**

SHIPPING—*Charterparty—Demurrage—Delay at Loading Port—Continuance of Demurrage Obligation.*

Where demurrage commences to be payable under a charterparty owing to the default of the charterers in failing to provide a quay berth at the port of loading, the obligation to pay demurrage continues, in the absence of any default of the shipowner, until the completion of the loading.

A ship was chartered to go to a foreign port for a cargo, the charterers guaranteeing a cargo and quay berth ready at the port of shipment; owing to their inability to provide a quay berth the ship went on demurrage and, while lying at anchor waiting for a quay berth, was run into by another vessel. The ship was properly taken by her captain to another port for repair, and during her absence for that purpose a quay berth fell vacant which would otherwise have been given to her. After her return to the port of loading she was kept waiting a further six weeks for a quay berth. The shipowners claimed demurrage for the six weeks, but not for the period during which she was absent for repairs:—

Held, that upon the return of the ship to the port of loading the demurrage period was resumed without any break in the continuity of the demurrage obligation, and that the charterers were liable to pay demurrage from that date until the loading was completed. TYNE AND BLYTH SHIPPING COMPANY *v.* LEECH, HARRISON & FORWOOD - - - **Kennedy J. 12**

2. —— *Charterparty—Demurrage—"Ship to be discharged with all reasonable despatch as customary"—Discharge into Railway Wagons—Deficiency of Wagons—Liability of Charterer.*

A ship was chartered to load a cargo of wood, to be carried to the port of Cardiff, and then to

SHIPPING—*continued.*

be "discharged with all reasonable despatch as customary." The custom at the port of Cardiff was to discharge such a cargo into the wagons of certain railways that had access to the quay. The charterers arranged with one of these railways for the supply of wagons to take the cargo. Without any negligence on their part, but owing to stress of work at the port, by reason of which there was a deficiency in the number of wagons available, the discharge of the ship was delayed. In an action against the charterers for the detention of the ship:—

Held, affirming the judgment of Bigham J., that the charterers having done their best to procure the appliances that were customarily used at the port for discharging such a ship, and having used them with proper despatch, were not liable for the delay. LYLE SHIPPING COMPANY *v.* CARDIFF CORPORATION - - C. A. 638

3. —— *General Average—Charterparty—Bill of Lading—Negligence Clause.*

Where a contract for carriage of goods by sea contains an exception of negligence of the master and crew, the shipowner is entitled to a contribution from the owner of the goods to general average expenses, though the necessity for the same has been occasioned by the negligence of the master:—

So *held* by A. L. Smith L.J. and Romer L.J., Vaughan Williams L.J. dissenting.

A charterparty, which contained an exception of the negligence of the master and crew, provided that the captain should sign bills of lading at any rate of freight the charterers or their agents might choose without prejudice to the stipulations of the charterparty, and that the charterers should indemnify the shipowners from any consequences which might arise from the captain following the charterer's instructions and signing bills of lading.

The captain, upon the instructions of the charterers, signed bills of lading for goods shipped by a third person, which did not contain a negligence clause. The ship coming into collision with another ship through the negligence of the captain, general average expenses were incurred in putting back for repairs:—

Held, that the charterers were liable to indemnify the shipowners against the loss sustained by them through their not being able to obtain a general average contribution from the owner of the goods by reason of the bills of lading not containing a negligence clause.

The Carron Park, (1890) 15 P. D. 203, approved of. MILBURN & Co. *v.* JAMAICA FRUIT IMPORTING AND TRADING COMPANY OF LONDON C. A. 540

4. —— *General Average—Sacrifice of Freight.*

Shippers chartered a ship to carry a cargo of coals from Cardiff to Esquimault. In the course of the voyage the coal heated to such an extent that if the ship had continued her voyage the ship and cargo would have been totally lost. The master, for the safety of all concerned, put into a port of refuge and landed the coal, which was subsequently surveyed and found to be in such a condition as to be incapable of being carried with safety to its destination. The master accordingly

SHIPPING—*continued.*

abandoned the voyage, and the chartered freight was lost:—

Held, that the freight had not been sacrified under such circumstances as to make the loss the subject of general average contribution.

Judgment of Bigham J., [1899] 2 Q. B. 356, affirmed. IREDALE *v.* CHINA TRADERS INSURANCE COMPANY - - - - C. A. 515

5. —— *Transfer — Registration — General Lighthouse Fund — Fees — Merchant Shipping (Mercantile Marine Fund) Act*, 1898 (61 & 62 *Vict. c.* 44), *s.* 3, *Sched. I.*

The Merchant Shipping (Mercantile Marine Fund) Act, 1898, Sched. I., gives a scale of the fees which are to be paid on the transfer of British ships "according to the gross tonnage represented by the ships or shares of ships transferred." Fifty-eight shares in a ship, each share being one-sixty-fourth, were transferred to a firm by twenty different bills of sale:—

Held, that the firm was liable to pay a separate fee, according to the scale, on the tonnage represented by the shares comprised in each bill of sale, and not merely to pay one fee upon the total of the tonnage represented by all the shares transferred. HARROWING STEAMSHIP COMPANY *v.* TOOHEY - - - - Kennedy J. 28

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See Cases under INSURANCE, MARINE.

SOLICITOR — Costs — Lien — Charging order— "Property recovered or preserved" in bankruptcy proceedings—Jurisdiction *See* BANKRUPTCY. 3. 489

—— Discovery — Production of documents — Privilege — Communications between solicitor and client—Evasion of statute *See* PRACTICE. 3. 163

—— Trustee in bankruptcy—Committee of inspection — Employment of solicitor — Costs—Taxation - - - 309 *See* BANKRUPTCY. 9.

STABLE —Public health—Sanitary convenience Workplace — Persons in attendance — Cabmen - - - - 397 *See* LOCAL GOVERNMENT. 1.

STAMP—Railway—Increase of nominal capital *See* REVENUE. 6. 353

STATION—Erection of—Accident to contractor's workman—Work ancillary to business of undertakers - - - 100 *See* EMPLOYER AND WORKMAN. 13.

STATUTE — *Implied Repeal — Exemption from Taxes and Assessments—Rates—City of London —7 Geo.* 3, *c.* 37, *s.* 51 (*Local*)—11 & 12 *Vict. c. clxiii., s.* 169 (*Local*).

Sect. 51 of 7 Geo. 3, c. 37, provided that certain lands in the City of London, reclaimed from the Thames, should vest in the adjoining owners "free from all taxes and assessments whatsoever."

Sect. 169 of 11 & 12 Vict. c. clxiii., provides that a rate for the purposes of the Act shall be made upon every occupier of houses or buildings in the City, "whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable

STATUTE—*continued.*

to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place or otherwise":—

Held, that the provisions of the later Act repealed by implication the exemption from rates given by the earlier Act. SION COLLEGE *v.* LONDON CORPORATION - - Div. Ct. 581

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STOCK EXCHANGE — *Broker, Default of — Liability of Client to Jobber—Privity of Contract—Principal and Agent.*

The defendant employed a broker to purchase for him certain shares on the Stock Exchange, and afterwards directed him to "carry over" the shares to the next account. The broker, in accordance with the regulations of the Stock Exchange, purchased the shares in his own name from the plaintiffs, who were jobbers on the Stock Exchange, and afterwards carried over with them the same shares. The defendant's name was not disclosed. Before the next settling day the broker was declared a defaulter on the Stock Exchange, and in accordance with the rules of that body his contract with the plaintiffs was closed, and the plaintiffs took back the shares at a price fixed by the official assignee of the Stock Exchange and known as the "hammer price." The plaintiffs having ascertained that the broker was acting for the defendant in this transaction called upon him to take up the shares. He declined to accept any responsibility for them; and the plaintiffs thereupon at once sold the shares for the best price then obtainable, and sued the defendant for the difference between the

STOCK EXCHANGE—*continued.*
price at which the shares had been carried over and that at which they had sold them:—

Held, that the defendant was liable for this amount, and not merely for the difference between the price at which the shares were carried over and the "hammer price."

Dictum of Kennedy J. in *Beckhuson* v. *Hamblet*, [1900] 2 Q. B. 18, followed and approved. ANDERSON & Co. *v.* BEARD
Mathew J. 260

2. —— *Principal and Agent—Broker lumping several Orders in one Contract—Liability of Principal to Jobber on Default of Broker—Stock Exchange Rules, r.* 177.

The defendant employed a firm of brokers on the Stock Exchange to purchase for him shares in a certain undertaking, and instructed them to "carry over" 210 of these shares to the next account. The brokers, having orders from other clients for shares in the same undertaking, purchased by a single contract in their own name 360 of these shares for the next account from the plaintiffs, who were jobbers on the Stock Exchange, and they apportioned in their books 210 of these shares to the defendant. Before the next settling day the brokers were declared defaulters on the Stock Exchange, and, in accordance with the rules of that body, their transaction with the plaintiffs was closed by the official assignee, the price of the shares being fixed at the price then current. The plaintiffs, having ascertained that the brokers were acting for the defendant as regarded the 210 shares, tendered those shares to him, and, on his refusal to take them, sold them on the settling day and claimed from the defendant the difference between the contract price and the selling price:—

Held, that, since the brokers had lumped the defendant's order with the orders of other clients, and had contracted in a single transaction with the plaintiffs for the purchase of a larger number of shares than they were authorized to purchase for the defendant, no such contractual relation existed between the plaintiffs and the defendant as would support the action.

Effect of rule 177 of the Stock Exchange rules discussed. BECKHUSON & GIBBS *v.* HAMBLET
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Sect. 2, sub-s. 2, of the Merchandise Marks Act, 1887, provides that a person selling goods to which a forged trade-mark is applied is guilty of an offence against the Act unless he proves that, having taken all reasonable precautions, he had no reason to suspect the genuineness of the trade-mark "or that otherwise he had acted innocently":—

Held, that a person who had reason to suspect the genuineness of a trade-mark might nevertheless have acted innocently in selling goods to which the trade-mark was applied, and might, therefore, be exonerated under this sub-section. CHRISTIE, MANSON & WOODS *v.* COOPER
Div. Ct. 522

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